No. 6

No. 886

In the Supreme Court of The United States

OCTOBER TERM, 1950

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Petitioner

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS, F. WALSH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT O. BEAN CO., BOSTON

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No. 536

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Petitioner

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 470) is reported in 185 F 2d 871. The opinion of the District Court is reported in 82 F. Supp. 614.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950 (R. 488). Petition for a writ of certiorari was filed February 6, 1951 by the Secretary of Agriculture.* The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

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* The intervenor, Dairymen's League Cooperative Association, has also petitioned for certiorari (No. 537). This brief replies to that petition also.

QUESTION PRESENTED

Whether the Court of Appeals for the District of Columbia Circuit has incorrectly decided an important question of Federal law which should be settled by this Court when it sustained the judgment of the District Court and held that certain provisions of Order No. 4, Regulating the Handling of Milk in the Greater Boston Marketing Area, as amended, providing for payments to cooperative associations through a deduction in producer prices, were not authorized under the Agricultural Marketing Agreement Act of 1937.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, U.S.C., Title 7, Section 601 et seq.) reenacting, amending and supplementing the Agricultural Adjustment Act, as amended. Pertinent sections of the Act are set out in Appendix A to the Petition.

The Order involved is Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area. The terms of the Order involved in this case are found in Section 904.9(a)-(d) and Section 904.7(b)(5) of Order No. 4, as amended August 1, 1941 [6 F.R. 3762, 7 CFR (1941 Supp.), 904.0] and the substantially similar provisions of Section 904.10(a)-(d) and Section 904.8(b)(5) of said Order, as amended August 1, 1947 [12 F.R. 4921, 7 CFR (1947 Supp.), 904.1 et seq.] (See Appendix B to the Petition.)

STATEMENT

Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, was originally issued by the Secretary of Agriculture, effective February 9, 1936 (R. 150). Among other times, it was amended

after public hearings on July 28, 1941, effective August 1, 1941 (R. 150). The Amendment of August 1, 1941 introduced into Order No. 4 for the first time a provision requiring the Market Administrator to make a deduction in his computation of the blended price to producers and to pay the amount so deducted to those producers that are cooperative associations of dairymen (R. 151). No similar payment is made to other producers. In promulgating this Amendment of August 1, 1941, the then Secretary of Agriculture made the following finding:

> ". . . that the provisions relating to the payments out of the equalization pool to cooperative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of the order, as amended, and necessary to effectuate the other provisions of the order, as amended." (R. 150-151)

The provisions with respect to cooperative payments and the accompanying deduction from producer prices have remained in Order No. 4, as amended, from August 1, 1941 down to the present time (R. 152). Slight procedural changes have been made in them. The Secretary's original finding has never been amplified or amended (R. 152).

In order to qualify for payments, Order No. 4 as amended requires that a cooperative association be of the character and perform the services which it spcifically prescribes (7 CFR 904.10(a) (1-8); 7 CFR 904.9(a) (1941 Supp.) The Petition repeatedly describes the qualifying services as "market-wide services", "services for the market as a whole" (see Petition, pp. 4, 5, 6, 8, 12). This is a confusing and inaccurate use of language. The Secretary's original finding did not describe the qualifying services as "market-wide services". He referred to them as "certain *marketing* services" (R. 151, italics supplied). They are primarily and almost exclusively services by cooperatives to their own members. The Order does *not* call for per-

formance by any cooperative of activities relating to the handling or disposition of surplus milk, although this alleged activity is repeatedly stressed in the Petition.

This action is nearly ten years old. It commenced in September 1941 (R. 1). The respondents, the original plaintiffs, are individual producers who are non-members of cooperatives and have an individual interest in the sums deducted from their prices for the cooperative payments (R. 153). At the outset the Secretary of Agriculture challenged the standing of the respondents to sue. This Court upheld their standing in *Stark* v. *Wickard*, 321 U. S. 288. Then the defendant moved for summary judgment and lost in the District Court (R. 58, 132). This was the defendant's second such motion (R. 1). At the hearing on the merits the terms of the Boston Order, and the Boston Order alone, were considered in the light of the pertinent statutory provisions. Both the District Court and the Court of Appeals have rendered careful opinions (R. 142, 470). Manifestly, this is a case to which the maxim "ut sit finis litium" has some application, particularly in the absence of error by the courts below in dealing with any important question of Federal law.

ARGUMENT

The Petitioner's "reasons for granting the writ", upon analysis, present three chief grounds:

1. The decisions below have far-reaching and adverse effects on the general administration of the Act (Petition, pp. 6, 14, 15, 16, 20, 21).

2. The decisions below incorrectly construed and applied the Act (Petition, pp. 12, 13, 14).

3. The court below decided the case in the absence of a pertinent administrative hearing record (Petition, pp. 3, 9, 10).

The Respondents will now take up each of these grounds in turn.

I. *The decisions below do not affect the general administration of the Act.*

The Petitioner asserts that this case involves important problems in the administration of the Act. In this connection he relies exclusively on the argument that the decisions below (1) affect adversely kindred provisions of three other Milk Orders; (2) make doubtful price adjustments or deductions of a different kind. Analysis will show that the decisions below were addressed to the particular provisions of the Boston Order and deal with a restricted problem of no such scope as the petition suggests.

There are at least twenty-nine markets regulated by Federal Orders issued by the Petitioner (R. 102). In only three of these markets do the applicable Orders contain provisions for cooperative payments. On the Petitioner's own basic theory, the validity of the provisions in these Orders must depend upon the economic conditions in the markets to which they apply as disclosed by the appropriate administrative hearing record on the basis of which they were promulgated. Moreover the terms of the other Orders are different. The New York Order prescribes important qualifying services which the Boston Order does not require or even mention (7 CFR 927.9(f); cf. 7 CFR 904.10). Similarly, the Boston Order sets forth qualifying requirements which are alien to the New York Order.

The provisions of the three other Orders have not been suspended by the Petitioner. There appears to be no pending litigation challenging their validity. In the two years which have elapsed since the District Court's opinion in this case, there is no showing that the Petitioner has made any effort by appropriate administrative action to insure that the cooperative payments currently made under

the other Orders shall be refunded by the recipients thereof in the event of a final judicial determination that they have been illegally disbursed. The inference is warranted that the Petitioner has not been seriously concerned about the possible impact of the holding by the courts below on the provisions contained in other Orders which were not even considered by those courts.

The Petition sets forth instances of deductions or adjustments provided for in various Milk Orders whose validity is alleged to be rendered doubtful by the decisions below. These instances are remarkably few in number when one considers the current extensive scope of Federal regulation of milk marketing. Upon analysis, they are of a radically different character from price deduction here in issue. Thus, the simple deduction for a cash balance to maintain the solvency of the equalization fund (Petition, p. 16) is not only authorized by Section 8c(5)(C) of the Act, but has been sharply distinguished by this Court from the deduction here involved. "Apparently this deduction for payments to cooperatives is the only deduction that is an unrecoverable charge against producers. The other items deducted under Section 904.7(b) are for a revolving fund or to meet differentials in price because of location, seasonal delivery, et cetera." (*Stark* v. *Wickard*, 321 U. S. 288, 301.)

The other price adjustments referred to in the Petition are also in an entirely different category from the deduction in the Boston Order. The "seasonality payments" of the Louisville Order (Petition, p. 17) may well be justified as a permissible "production differential" under Section 8c(5)(A)-(B) of the Act and are well within the express authorization of Section 8c(5)(B)(d) which was designed to permit a price adjustment reflecting the producer's "marketings of milk during the representative period of time." The "diversion payments" to handlers de-

scribed and applied in *Grand View Dairy* v. *Jones*, 157 F. (2d, C.A.) (Petition, p. 15) did not turn upon the corporate character of the receiving handler. Those payments, admittedly no longer in effect, constituted a species of the "location differential" expressly authorized in Section 8c(5)(A)(B). The Court in the *Green Valley Creamery* v. *U. S.*, 108 F.(2) 342) sustained the adjustments there in issue as coming within the express authorization of the Act for "market" and "location" differentials.

An outstanding characteristic of all the price adjustments referred to in the Petition, exclusive of the cooperative payment deduction, is that they are rooted in a significant economic incident involved in the very process of the delivery or handling of the producer's milk. With the single exception of the cooperative payment deduction, none of the deductions or adjustments takes away money from one group of producers and then disburses the resultant funds to a certain group of handlers, making the payment dependent exclusively upon the corporate character of the recipient as a cooperative association serving its members. The novelty of the exaction involved here has been pointed out by this Court. "The challenged deduction is a burden on every area sale". *Stark* v. *Wickard*, 321 U.S. 288, 303.

Adjustments and deductions affecting the computation of the milk producers' price are set forth in minute detail among the major prescribed terms of a milk order. They were painstakingly described by the Congressional Committees which drafted the Act. (House Committee on Agriculture, 74th Congress, First Session, House Report No. 1241, pp. 9-10; Senate Report, 74th Congress, First Session, No. 1011, pp. 9-10). Yet they were expansive and detailed enough to allow for the widest range of flexible administrative action. The decision below does not prevent the Petitioner from making seasonality or diversion payments or prohibit him from the simple process of preserving a cash balance in the equalization fund.

II. *The Decisions Below Correctly Construed and Applied the Act.*

The petition assigns relatively few specific errors of law to the Courts below. It complains rather generally of a restrictive construction of the Act.

The Act opens with the declaration that orders "shall contain one or more of the terms and conditions" which are enumerated, and except for the category next mentioned "*no others.*" The Secretary is authorized to insert other terms and conditions which meet three prerequisites—they must be "incidental to, and not inconsistent with, the terms and conditions specified" in the Act and necessary to effectuate the other provisions of an order (Sec. 8c(7)(D), U.S.C., Title 7, Section 608c(7)(D)). A term does not secure entry to a milk Order merely because the Secretary deems it incidental or necessary to carry out the declared policy of the Act.

The statutory words "*incidental to*" and "*not inconsistent with*" are not used in reference to the provisions of an Order, but to the prescribed terms set forth in the Act itself. They are words expressing a relationship. That relationship can be established only with reference to the very definite terms of the Act understood in the light of its history and applied to the specific provisions of the Order before the Court.

In prescribing the substantive terms of a milk order, Congress treated as major matters of policy worthy of express legislative mandate: (1) the computation of the producer's milk price and all permissible deductions therein (Sec. 8c(5)(A) and (B)); (2) the specific marketing services for which deductions are appropriate from the price to these producers who are non-members of cooperatives (Sec. 8c(5)(E)); (3) the many detailed rights and privileges to be accorded cooperative associations (Sec. 8c(5)(F);

U.S.C. Title 7, Sections 608c(12) and 610(b)(1)). Congress similarly explicitly prescribed authorized programs relating to surplus, and reserves of agricultural commodities. In the case of milk, where the problem was regarded as seasonal, it outlined different techniques for dealing with the problem than in the case of other products (Sec. 8c(5)(B)(d), 8c(5)(D), cf. U.S.C. Title 7 Sec. 608c(6)(D) and (E); See House Report No. 1241, 74th Congress, 181 Session, p. 10, 11).

The Courts below, therefore, were applying a statute which did not leave the Administrator "at large" but formulated national policy with particularity (See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617). If the petitioner feels cramped or circumscribed (See Petition, pp. 21, 23), his quarrel is not with the Courts below but with the Congress which undertook "to set out specifically just what these orders may and may not contain," (79th Cong. Rec. 9461; House of Representatives, 74th Congress, 1st Session, Report No. 1241, June 15, 1945; see also Senate Report, 74th Congress 1st Session, May 3, 1935 (Calendar Day July 13)) and the Congress which failed to pass the legislation he sought authorizing him to include in an order provisions analagous to those here in issue. (R. 149, 486)

As the Court below held, the price deduction under the Boston Order for cooperative payments is not "incidental to" or "consistent with" the provisions of Section 8c(5). It is a price adjustment outside of those expressly enumerated as the *only* allowable adjustments. It provides a novel money bounty to cooperative associations entirely outside the scope of the specific privileges and powers accorded to them in the utmost detail by the Legislature. It directly offends Section 8c(5)(E). Here Congress covered the field of service deductions from producers who are non-members of cooperatives, enumerating the services: "market information, verification of weights, sampling and testing of

milk," and authorizing deductions which are "appropriate" for those services. Under the provisions of the Boston Order the cooperative associations are not required to render these services to non-member producers but are required to render these services to their own members (7 CFR 904.10(3)(5)). The distortion of the Act involved here is almost bizarre. Under a Statute authorizing a deduction from the prices to non-member producers for specific services rendered to them, these very producers are subjected to a deduction based upon the rendition of the services, not to them, but to others. To complicate things, the deduction is then justified as being made not on account of the only qualifying services prescribed in the Order, but on account of so-called "market-wide services" (Petition, pp. 12, 13);—services which are nowhere prescribed or even mentioned in the Order and which in turn fall entirely outside the scope of the services which the Act specifies as the exclusive basis for a price deduction from non-member producers.

Confronted with the express language of Section 8c (5)(B) that the producer price shall be subject *only* to prescribed adjustments, the petitioner argues that this deduction is not "'sui generis" with the adjustments specified. It "is taken out of the equalization pool before the uniform price to be paid to producers is determined". (Petition, p. 13). The answer is that several of the authorized adjustments, such as the base rating adjustment and those for grade quality and location differentials, are made in precisely the same manner.[1]

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[1] New Orleans Order, Sec. 942.7(c) 14 FR 5960 (1949);
Wichita Order, 7 CFR 968.7(b);
Quad Cities Order, 7 CFR 944.7(b)(3);
Dayton-Springfield Order, 7 CFR 971.7(c)(4);
Minneapolis-St. Paul Order 7 CFR 973.7(b)(2);
Boston Order, 7 CFR 904.8(b)(4).

The argument is next advanced that the contested deduction is not in reality a price adjustment—it is rather "a payment for services" (Petition, p. 13). The Petitioner, having elected to treat it as a "service" payment, then completely fails even to attempt to reconcile it with the provisions of Section 8c(5)(E) which regulate service payments and to which it is repugnant.

Finally, an effort is made to bring the provision within the express terms of Section 8c(5). It is suggested that if it should be a price adjustment after all (Petition, p. 14), then it comes within Section 8c(5)(B)(d) which authorizes "a further adjustment equitably to apportion the total value of the milk purchased by any handler, or by all handlers among producers, on the basis of their marketings of milk during a representative period of time." The cooperative payment provisions do not purport to apportion "the total value of milk" or to have any relationship to marketings of milk "during a representative period of time."

In the District Court the Petitioner disclaimed any reliance on this provision.[2] However, previous shifts of the administrative position on this point had made the Respondents wary. (See 9 F.R. p. 3059, March 21, 1944.) Hence they introduced in evidence official publications of the Department of Agriculture which made clear the relationship of this provision to the familiar "base rating" plan.[3] That plan is described in paragraph 6 of the Findings of Fact of the trial Judge (R. 153). The language of subparagraph (d) of 8c(5)(B) exactly fits the base rating plan and was intended to authorize that plan (Senate Report No. 1011, p. 11; House Report No. 1241 (p. 10) 74th Congress, First Session). The provision is "entirely unrelated to any plan for payment to cooperative associations out of the equalization fund" (R. 153).

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[2] Transcript of Hearing in the District Court Feb. 7, 1949, pp. 18, 19.

[3] "Stability of Milk Markets", U.S. Dept. of Agriculture Marketing Information Series D.M. (3) 1938, p. 12; "Base Allotments or Quota Plans used by Farmer's Cooperative Associations", Farm Credit Adm. U.S. Dept. of Agriculture M.R. No. 25, May 1940, p. 2-3.

The question of whether the provisions in issue are "necessary" to carry out the other provisions of the Order is not reached until after a showing that the provisions are "incidental" and "consistent." The Courts held that no such showing was made. Much of the petition is concerned with the alleged application by the Court below of an unduly rigorous or severe standard of proof in applying the statutory criterion of "necessity." The petitioner seeks to justify the payments, not on the basis of the qualifying services which he prescribed in the order, but on the basis of the existence of evidence in the hearing record of other so-called "market-wide" services, the rendition of which the Order did not require. When the petitioner maintains that it is necessary to the operation of the Order that he stimulate, encourage or compensate cooperatives for one set of activities through the medium of a term which provides for payment to them for performing an entirely different set of activities, his position appears to defy normal processes of logic.

In any event, the administrative hearing record made it quite plain that the so-called "market-wide" services of manufacturing surplus or selling fluid milk in short supply were business operations carried on by handlers, whether proprietary or cooperative, voluntarily and for profit. The petitioner's representative and economist (R. 14) recognized these factors and suggested at the hearing that any payments to cooperatives must be surrounded with certain "necessary" conditions: they must sell milk to other handlers at the Class I price without a premium, maintain the availability of their supplies, free of long-term contracts; and willingly accept all milk without a market (R. 198, 199). The provisions of the Order, however, were written with no such conditions attached to the receipt of payments. The cooperative associations receiving payments were free to and did charge premium prices on fluid milk sales to other handlers (R. 92, 93, 94, 104, 374, 419).

The Court below was willing to concede that all such activities are aids to all participants in the market. This alone, however, did not make it necessary that they be subsidized with milk producers' money. The dealer who expands the consumer demand for fluid milk, the Dairy Council which advertises milk and dairy products, the Dairy Herd Improvement Associations, the State Agricultural Colleges, all engage in activities which are "pronounced aids to all participants in the marketing area—producers, handlers and consumers." However, as the Court below held, the certainty that such services are beneficial does not establish that a term requiring an enforced monetary contribution to them from milk producers is necessary to the other provisions of the Order. This, we submit, is no harsh reading of the word "necessary." Any more lax construction would make the term meaningless.

III. *The Courts below did not decide the case in the absence of a pertinent administrative hearing record.*

The Petitioner's final ground injects a false issue into the case. The District Court and the Court of Appeals had before them the entire administrative hearing record on the basis of which the Secretary promulgated the challenged provisions of the Order and on the basis of which he made his only statutory finding (R. 466, 150, 152). The District Court found as a fact "the provisions with respect to cooperative payments, and the accompanying deduction from producer prices, have remained in Order No. 4 as amended from August 1, 1941 down to the present time. Slight procedural changes have been made in them. On August 1, 1947 the rates of the payments were revised. The Secretary's original finding has never been amplified or amended. At the present time, the cooperative payment provisions of the Order are contained in Sections 904.10(a)-(d) and 904.8(b)(5)." (R. 152). The Court of Appeals held that this finding was sustained by "the only evidence" (R. 473-474). The Petitioner made no effort to introduce at the trial any administrative hearing record other than the basic record upon which the contested provisions of the

Order were promulgated. Neither party at the trial sought to burden the record, already large with the bulk of a ten-year old litigation, with hearing records which pertained only to "slight procedural changes" in the Order. As the Court of Appeals stated, "the record is clear that both the results of and the records of those later hearings were not regarded as important by either party at the trial" (R. 474). The Petitioner's present expression of concern over the absence of the 1946 hearing record is an effort to change its position from that which it took at the trial.[4]

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 1951.

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[4] It is worth noting that in November, 1946, the Petitioner successfully opposed a proposed amendment to the complaint which made reference to the evidence in the 1946 hearings. (R.160) The Petitioner was then anxious to keep the 1946 hearing record out of the case. His reasons were not hard to find. The record of the hearing is summarized in 12 F.R., p. 1169, where it is said, inter alia, "Notably the present-day cooperative has not been burdened with the difficulties arising from surplus milk production. The cooperative associations have enjoyed the superior bargaining position of a seller of a short commodity." In the light of the Petitioner's attitude in 1946 and because the 1946 hearings ultimately led to no significant change in the Order or no new finding by the Secretary, the respondents, anxious to avoid complicating this case with interminable procedural controversies, did not again press for the admission of the 1946 hearing record.

BRIEF FOR THE RESPOND-ENTS

No. 6 AND 7

Nos. 6, 7.

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No. 7

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., *Petitioner*

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, R. 470, affirming the judgment of the District Court, is reported in 185 F.2d 871. The opinion of the District Court, R. 142, is reported in 82 F. Supp. 614.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 9, 1950 R. 488. The petitions for writs of certiorari filed by the Secretary of Agriculture and by the intervenor, Dairymen's League Cooperative Association, on February 6, 1951, were granted on April 16, 1951. R. 491, 341 U. S. 908. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 601 *et seq.* (1946), which reenacted, amended and supplemented the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended by the Act of August 24, 1935, 49 Stat. 750.

The Order involved is Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area. The contested provisions of the Order were first included by an amendment effective August 1, 1941. 6 Fed. Reg. 3762, 7 Code Fed. Regs. § 904.9 (Supp. 1941). The substantially similar provisions of the Order, as amended August 1, 1947, appear in 7 Code Fed. Regs. § 904.10 (1949).

QUESTION PRESENTED

Are the provisions of the Boston Order for special payments to cooperative associations through a reduction in producer prices authorized under the Agricultural Marketing Agreement Act of 1937?

STATEMENT

The respondents, who are dairy farmers, instituted this action to enjoin the Secretary of Agriculture from making special payments to cooperative associations of producers pursuant to the Boston Order. The respondents assert that the special payments provided for in the Order are not authorized under the Act.

The action was originally dismissed by the District Court on the ground that the Act vests no legal cause of action in milk producers, and the judgment of the District Court was affirmed by the United States Court of Appeals for the District of Columbia. *Stark* v. *Wickard*, 136 F.2d 786 (1943). That decision, however, was reversed by this Court, which held that "the producers have legal standing to object to illegal provisions of the Order." *Stark* v. *Wickard*, 321 U. S. 288, 306 (1944). The District Court was directed by this Court to consider "whether the statutory authority given the Secretary is a valid answer to the petitioners' contention." 321 U. S. at 311.

On remand, the District Court concluded that the Secretary, in providing for the challenged special payments, "exceeded his statutory authority and that consequently the provision should be adjudged illegal and void and its enforcement should be restrained." R. 142, 150, 82 F. Supp. 614, 619 (1949). The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court, with Judge Edgerton dissenting. R. 470, 185 F.2d 871 (1950). This Court has brought the judgment of the Court

of Appeals before it for review upon the petitions of the Secretary of Agriculture and the Dairymen's League Cooperative Association, Inc., which had intervened in the District Court as a party defendant, R. 51-52.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, which appear in Appendix A, p. 73, *infra*, have previously been reviewed at length by this Court. *Stark* v. *Wickard*, 321 U. S. 288 (1943); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1938). The Act requires the Secretary of Agriculture to issue orders applicable to persons "engaged in the handling of" specified agricultural commodities, including milk, whenever he finds, after notice and an opportunity for hearing, "that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of" the Act. § 8c(1)-(4). In the case of milk and its products, the Act requires that the Order contain one or more of the terms specified in § 8c(5) and "no others," except certain terms common to all orders and set out in § 8c(7).

Section 8c(5)(A) authorizes a term classifying milk in accordance with its use and fixing uniform "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers," "subject only to" specified adjustments. Sections 8c(5)(B) authorizes a term providing for "the payment to all producers and associations of producers" of "uniform prices" for their milk, irrespective of the use thereof made by any individ-

ual handler, again subject "only to" specified adjustments. "In order to accomplish the purposes set forth in paragraphs (A) and (B) of" § 8c(5), paragraph (C) provides "a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A)." This permits the establishment of what is commonly known as the "equalization pool" or "producer settlement fund."

Section 8c(5)(E) permits a term providing for the rendition of services enumerated therein to producers, excepting those "producers for whom such services are being rendered by a cooperative marketing association," "and for making appropriate deductions therefor from payments to producers." Section 8c(5)(F) allows a cooperative to distribute the net proceeds of all its sales "in accordance with the contract between the association and its producers."

Section 8c(7)(D) authorizes additional terms in any order provided such terms are "Incidental to, and not inconsistent with, the terms and conditions specified in subsection (5), (6), and (7) and necessary to effectuate the other provisions of such order."

With regard to the Boston Order, the pertinent provisions of which are set out in Appendix B, p .79 *infra*, the District Court found the following material facts. R. 150-152.

The Order was originally issued by the Secretary of Agriculture, effective February 9, 1936,

and was amended, among other times, after public hearings on July 28, 1941, effective August 1, 1941. Under the Order as originally issued and amended, all milk sold by dairy farmers, who are generally known as producers, is divided into two classes: Class I, milk sold for use as fluid milk; and Class II, milk sold for use for other purposes, such as the manufacturing of butter and cheese. The Order provides for fixing minimum prices for Class I and Class II milk to be paid by the distributors, who purchase from the producers, and who are generally known as "handlers." Each handler pays for the milk that he receives. The Market Administrator, however, computes, on the basis of the minimum prices, the value of all milk sold in the area each month and, after making certain adjustments prescribed by the Order, calculates a weighted average price, or "blended price," as it is called. Each producer is paid on the basis of the blended price, subject again to certain adjustments. Thus each producer receives, by virtue of this equalization plan, a proportionate share of the total proceeds of all milk sold in the marketing area, irrespective of whether his milk is used by the purchaser as Class I or Class II milk.

Before the blended price is computed, however, the Administrator is required by § 904.8(b)(5) of the Order to make the challenged deduction to provide for the special payments to those producers who are cooperative associations of dairymen. No similar payment is made to other producers. Provision for this deduction for cooperative payments was introduced into the Order as amended for the first time by the amendment effective on August

1, 1941. In promulgating this amendment the Secretary made the following finding:

> " . . . that the provisions relating to the payments out of the equalization pool to cooperative associations performing certain marketing services are incidental to, not inconsistent with, the other provisions of the order, as amended, and necessary to effectuate the other provisions of the order, as amended." R. 150-151.

The provisions with respect to cooperative payments, and the accompanying deduction from producer prices, have remained in the Order as amended from August 1, 1941 down to the present time. Slight procedural changes have been made in them, but the Secretary's original finding has never been amplified or amended. R. 152.

The District Court further found that the producer plaintiffs who instituted this action were non-members of cooperative associations, that they had been delivering milk to the Boston market for many years, that they have an individual interest in the sums deducted from their prices for payments to cooperative associations and that they all voted against issuance of the Order as amended, except one who did not vote. R. 152-153.

SUMMARY OF ARGUMENT

The courts below correctly held that the Agricultural Marketing Agreement Act of 1937 does not authorize the provisions of the Boston Order, as amended, granting special payments to cooperative associations through a reduction in the uniform price paid to producers for their milk.

It was undoubtedly a purpose of the Act to mitigate the disturbing seasonality factor in milk production, but these provisions do not serve that purpose. The Order does not require or even mention the so-called "market-wide services" on which the petitioners rely to show a contribution by the special payments toward overcoming the seasonality problem. The qualifying criteria for these payments chiefly relate to the performance by a cooperative of services "to its members"; there is no requirement that a cooperative handle surplus milk or maintain reserve supplies for sales to other handlers in times of market shortages. The Order does nothing to encourage the rendition of these or other alleged "market-wide services" deliberately omitted from its qualifying terms.

The special payments are not authorized by any provision of the Act. Congress did not grant the Secretary of Agriculture power to include in a milk order whatever terms and conditions he deems to be necessary or desirable in the accomplishment of the general purposes of the statute. Definite limits were fixed upon the exercise of his administrative discretion. The Secretary was authorized to include in a milk order only one or more of the terms expressly prescribed in § 8c(5), and such auxiliary terms as meet the triple test of § 8c (7)(D). This test requires that any term which is outside the defined terms of § 8c(5) must be incidental to those terms, consistent with them, and necessary to the effectuation of the authorized provisions of orders.

No one of the terms of § 8c(5) sanctions the special payments. Indeed, none is relied upon by the

Secretary, except for a clause in paragraph (B) authorizing "a further adjustment" in producer prices. The purpose of this adjustment is to permit the operation of the so-called "base rating plan," designed to even out yearly production by pricing at a higher rate that portion of a producer's current milk deliveries which is within the quota assigned to him on the basis of his marketings during a representative period of time. The statutory language which fits this plan with precision cannot be stretched to authorize the cooperative payments, nor can the general encouragement of cooperatives directed by § 10(b)(1) be used as a means of stretching it.

Section 8c(7)(D) does not authorize the challenged provisions. The special payments are not incidental to the terms prescribed in § 8c(5). They are entirely independent and of major importance. In the prescribed substantive terms of a milk order Congress has treated as matters worthy of express mandate: (1) the computation of the milk producer's price and all permissible adjustments therein; (2) the specific marketing services to producers who are non-members of cooperatives for which deductions are appropriate; (3) the rights and privileges to be accorded cooperative associations; and (4) specific measures directed toward overcoming the seasonality factor in milk production. By the special payments here in issue, the Secretary adds a new type of adjustment to those specified by Congress, deducts sums from non-member producers on account of services by cooperatives to their own members, and grants the cooperatives an additional and unique privilege

by way of a money bounty from the producer settlement fund. All these steps are taken for the alleged purpose of dealing with the problem of seasonal surplus in milk production through a method radically different from the various carefully considered terms of milk orders. In the case of "other commodities," but not in the case of milk, Congress expressly authorized supplementary measures for dealing with the surplus problem and provided for the sharing the costs of such measures. The special payment provisions, far from being incidental to the authorized terms of § 8c(5), actually create a new term of coordinate importance with those prescribed.

The special payments are not only not incidental to the terms authorized by § 8c(5), but are in sharp conflict with them. Paragraphs (A), (B), (C) and (E) of that Section are carefully integrated provisions designed to accomplish the general purpose of Congress to distribute to producers the total dollar value of their milk. Thus, the debit account of handlers and the credit account of producers are kept in scrupulous balance by listing the "only" adjustments common to each, and repeating the description of each such adjustment to avoid any possible unbalancing factor. The only adjustment which may affect the method of distributing the value of the pooled milk to producers without affecting the total financial obligation of handlers therefor, is distinctly described and labelled as a "further adjustment." Finally, the service deductions which may be made from producer prices are itemized in paragraph (E). Nevertheless, the Secretary asserts that § 8c(5) leaves a gap between what handlers pay and what

producers receive, and that as a consequence he is empowered to siphon off a portion of the monetary value of producers' milk and divert this portion to cooperatives. Since the grant of such a power would have been incompatible with the entire plan of § 8c(5), its actual exercise by the Secretary brings the contested payments into direct conflict with the specific provisions of that Section. Such payments effect a price adjustment outside of the only permissible adjustments of paragraphs (A) and (B). They subject non-member producers to a deduction for cooperative services which is outlawed by paragraph (E). They break down the requirement of uniformity in the classified prices payable by handlers and in the blended price payable to producers by giving to one group of handlers a thinly disguised rebate from the Class II price fixed by the Order, and by forcing one group of producers to contribute to associations of other producers.

The special payments are not necessary to effectuate the other provisions of the Order. The argument for their necessity is that they "compensate" cooperatives for rendering "market-wide services." The argument is wholly answered by the fact that the Order does not require "market-wide services." So far as the Order is concerned, cooperatives may continue these activities if they are profitable, and quit them if they are not. Payments made without regard to the performance of "market-wide services" manifestly cannot be compensation for, or even an incentive to, such performance. Furthermore, so far as processing surplus milk and supplying fluid milk in the short season are concerned, the phrase "market-wide

services" is an eleemosynary-sounding label for what are in fact profitable business operations. When cooperatives sell milk to other handlers in short supply, they are and have always been free to charge all that the traffic would bear. Although their manufacturing of surplus milk may involve higher costs than other handlers incur, there is no showing in the Record that it is an unprofitable activity. On the contrary, there is considerable evidence that it can be quite profitable. It is not necessary to effectuate the Order provisions that profitable activities of any handler, voluntarily entered upon, be subsidized with producers' money.

No amendatory action by Congress and no administrative construction of the Act of 1937 shakes the conclusion that the special payments are unauthorized. Mere re-enactment in 1937 of the 1935 amendments to the Act of 1933 cannot be construed as indicating Congressional approval of all terms of milk orders then in effect. The failure of a proposed 1940 amendment which would have explicitly authorized special payments to cooperatives tends, if anything, to show that Congress did not intend the Secretary to have power to require such payments. No other deductions under the 1937 Act rest upon such a flimsy statutory basis as the deductions challenged here, except for the comparable payments to cooperatives under three other milk orders. The comparable provisions of the New York Order, as well as the challenged terms of the Boston Order, were vigorously attacked in the courts as soon as they became effective. Under such circumstances, the Secretary's action falls far short of a settled administrative construction of the Act.

I. The Provisions of The Boston Order For Special Payments to Cooperatives Serve No Purpose of The Agricultural Marketing Agreement Act.

The issue in this case is statutory power of the Secretary of Agriculture to require the special payments to cooperative associations provided for in the Boston Order. The issue was so formulated by this Court when the case was previously before it, and the petitioners have accepted this formulation. See *Stark* v. *Wickard*, 321 U. S. 288, 307 (1944); Secretary's brief, pp. 9, 10, 25, 45; Dairymen's brief, pp. 2, 17.[1]

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[1] The Dairymen's League, it is true, in Part IV of its brief also contends that this is not a class action, that the respondents are not the real parties in interest, and that they are estopped from maintaining the action. With deference to counsel for the Dairymen's League, we regard these contentions as not warranting extended reply, but refer the Court to the opinions below. R. 471-72, 185 F.2d at 873; and R. 145-46, 82 F. Supp. at 616-17. Indeed, the Dairymen's League itself urges the Court not to dispose of the case on the basis of these contentions, Dairymen's brief at p. 16, which the Secretary deliberately withdrew from litigation between the parties prior to trial. R. 466. These contentions are also based on serious inaccuracies in dealing with the facts in the Record. The estoppel argument rests on an alleged failure by respondents to vote against the contested provisions in the producer referendum. Dairymen's brief, pp. 66, 67. The District Court found as a fact: *"All of the plaintiffs voted against issuance of the Order as amended, except one who did not vote."* R. 152. The affidavit of the Federal Milk Market Administrator in charge of the official balloting was to the same effect. R. 91. The fact was admitted by the pleadings. R. 3, 48. The League's charges as to the respondents' interest in the case, Dairymen's brief, pp. 62-66, are replete with similar serious deviations from the evidence. See R. 275, 278, 326-27, 331-35, 338, 339-49.

The question whether the Secretary has power to require the challenged payments can be answered only by reference to the terms of the Agricultural Marketing Agreement Act, which "carefully and meticulously enumerates the exact types of provisions that may be contained in a marketing order." District Court Opinion, R. at 146, 82 F. Supp. at 617. The cooperative-payments provisions of the Boston Order, as we propose to demonstrate, are not authorized by the Act. The petitioners, however, seek to divert attention from the authority expressly or impliedly conferred upon the Secretary by the terms of the Act to the broad purposes of the Act.

There is no disagreement between the petitioners and ourselves as to what those purposes were. Congress undoubtedly, in enacting the milk-order provisions of the Agricultural Marketing Agreement Act, intended to establish a mechanism enabling the Secretary of Agriculture to cope with the problem of seasonal fluctuation in the supply of milk. With the petitioners' characterization of that complex problem and its difficulties we are in entire accord. But the petitioners proceed from there by steps that we are compelled to challenge. Payments to cooperatives from the Boston market equalization pool, they argue, enable cooperatives to render market-wide services which contribute to dealing with the seasonal surplus problem. This means of implementing a purpose of the Act, therefore, must be in conformity with § 8c(7)(D) of the Act as "incidental to" and "not inconsistent with" the Act and "necessary to effectuate the other provisions of" the Boston Order.

With the major premise of this syllogism—that it was a purpose of the Act to overcome the seasonal surplus problem—we are, as we have said, in accord. We contest, however, both the minor premise and the conclusion. We contest the minor premise on the ground that the services by cooperatives qualifying them to benefit from the special payments are not market-wide services which contribute to the solution of the seasonal surplus problem. This being so, payment for these services cannot further a purpose of the Act. Such payment cannot, therefore, be "incidental," "not inconsistent" and "necessary," even if, which we deny, no more than furtherance of some purpose of the Act were needed to bring a milk-order provision within § 8c(7)(D). If the minor premise falls, the conclusion must also fall.

In support of their contention that the special payments merely compensate the cooperatives for the performance of market-wide services which are of benefit to producers other than their own members, the petitioners point to such activities of the cooperatives as providing an outlet for surplus milk in their own manufacturing plants, supplying fluid milk to proprietary handlers, and assisting in the process of price-fixing under the Order. Secretary's brief pp. 30-45; Dairymen's brief, pp. 33-41. It may indeed be true that the 1947 hearing record relied upon, in its absence, by the petitioners would show that the cooperatives, like many proprietary handlers, do engage in such activities. No such finding, however, has ever been made the basis for the promulgation or amendment of the contested provisions for special pay-

ments to cooperatives.[2] The 1947 hearing record may also contain testimony that such activities do contribute toward overcoming the seasonal surplus problem.[3] Again administrative findings are lacking. Why? There is an obvious explanation. Such findings would not have been material to the prescribed criteria of eligibility to receive special payments: *a cooperative is not required to perform market-wide services in connection with the handling of surplus milk in order to be entitled to the special payments.*

The Order narrowly and specifically lays down a list of the requirements that a cooperative association must satisfy in order to qualify for the

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[2] The only "finding" was a paraphrase of the language of § 8c(7)(D). 6 Fed. Reg. 3762 (1941), 7 Code Fed. Regs. § 904.0 (Supp. 1941), quoted at R. 150. Such a paraphrase sheds no light on what evidence the Secretary regarded as supporting the Order or its amendment.

[3] We are at a loss to account for the Secretary's recent emphasis on this hearing record. In point of fact, as a careful reading of the Secretary's 1947 findings makes clear, he based no new finding as to the cooperative payments on the new evidence adduced before him, but merely reaffirmed the old finding on the basis of the old evidence. See 12 Fed. Reg. 4921 (1947); Secretary's brief, Appendix B, p. 96. A reason for his failure to rely on the new evidence appears in the report on the 1947 hearing by the Acting Assistant Administrator: "The evidence in the record indicates that the operating cooperatives in the market have not in recent years been obliged to exercise with such vigor their activities in selling milk and maintaining producer bargaining power." 12 Fed. Reg. 1169 (1947).

special payments. The Order provides in § 904.10 (a)[4]:

"The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he determines that it meets all of the following requirements.

(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

(6) It constantly maintains close working relationships with its members.

(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by pro-

[4] Appendix B *infra* at pp. 82-83.

ducers and the operation of a plan of uniform pricing of milk to handlers.

(8) It is in compliance with all applicable provisions of this subpart."

No other requirements are specified. These qualifying services, plainly, are services of a cooperative primarily, and almost exclusively, to its members, a phrase which the Order repeatedly uses to describe them. Supplying an outlet for surplus milk is not mentioned. Supplying fluid milk to proprietary handlers is not mentioned. None of the services that are mentioned, in fact, have anything to do with the handling of surplus milk or reserve supplies of milk.[8] Nor was the failure to require the rendition of market-wide services as a condition for the receipt of special payments inadvertent. As originally proposed, the cooperative-payment provisions of the Boston Order would, like the similar provisions of the New York Order, have required such services in

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[8] Payments are made to cooperatives qualified under the Boston Order at the rate of 1 cent per cwt. on milk which their members deliver to the plants of a handler "other than a qualified association." 7 Code Fed. Regs. § 904.10(b)(1) (1949). Payments in this category are therefore dependent, upon the condition that the recipient cooperative does *not* have its own facilities, and hence, upon its being under an actual disability to render any service by way of processing surplus milk. Payments are also made to qualified cooperatives at the rate of 2 cents per cwt. on milk received at a plant operated by an association. 7 Code Fed. Regs. § 904.10 (b)(2) (1949). Again, there is no requirement that a cooperative receiving payments at this rate maintain reserve supplies, or process surplus milk, or sell to other handlers surplus milk on short supply.

order to qualify for the payments. R. 213, 233. The omission, therefore, was deliberate; the wide variations in the capacity of individual cooperatives to render market-wide services made it inexpedient, presumably, to require their rendition as a condition for the receipt of payments. See 12 Fed. Reg. 1170 (1947); R. 24-25, 100-01.[8] These provisions of the Boston Order, in any event, do nothing to encourage, nor could they have been intended to encourage, the rendition of services which were deliberately omitted from their qualifying terms.

Apart from the fact that the Order cannot be justified as compensating market-wide services which it neither requires nor encourages, there is another important reason why payments on account of the alleged "market-wide services" cannot be treated as implementing a Congressional aim. Such activities as the manufacture of surplus and the sale of fluid milk in short supply are business operations carried on by handlers, whether co-

[8] In this respect the Boston Order differs strikingly from the New York Order cited at p. 38, n.11 of the Secretary's brief. The New York Order does, but the Boston Order does not, specify as qualifying services contributions to the disposal of surplus milk in the flush season and the supplying of fluid milk in the short season. *Compare* 7 Code Fed. Regs. § 904.10(a) (1949) *with* 7 Code Fed. Regs. § 927.9(f) (1949). The Secretary attempts, on the same page of his brief, to equate the higher payments under the New York Order to cooperatives which maintain a plant big enough to receive the milk of non-members with the higher payments under the Boston Order to cooperatives which simply maintain a plant. *Compare* 7 Code Fed. Regs. § 904.10(b)(2) (1949) *with* 7 Code Fed. Regs. § 927.9(f)(3) (1949). This attempt is misleading: the former payments may compensate a service to non-members; the latter plainly do not.

operative or proprietary, voluntarily and for profit. See pp. 57-58, *infra*. These activities need no compensation out of the producer settlement fund and no extra cash inducement. A cooperative could abandon them if they proved unprofitable without giving up its right to receive the payments. As for assistance by cooperatives in the process of price-fixing, this is a function to which others contribute without expectation of financial reward. See p. 59, *infra*. The payments cannot be regarded, therefore, as "compensation" in any true sense of the word. They are a bounty, pure and simple; no other name is adequate to describe a device which takes money from non-member producers to pay cooperatives for services to their own members.

The producer settlement fund is held by the market administrator as "trustee for the producers." *Stark* v. *Wickard*, 321 U. S. 288, 305 (1944). The vague sanction of a Congressional purpose to deal with the milk-surplus problem is not enough to justify the dissipation of this fund in a novel bounty to cooperative associations. Nothing less than an explicit Congressional mandate should suffice. As we shall show in the next part of our brief, the Agricultural Marketing Agreement Act contains no such mandate. Provision for payments to cooperatives is not included among any of the expressly enumerated terms and conditions of milk orders. Such payments, furthermore, are not "incidental to" the terms of the Act, are "inconsistent with" the machinery for dealing with the surplus problem established by Congress, and are not "necessary to effectuate the other provisions of" the Boston Order.

II. The Special Payments to Cooperatives Are Not Authorized by Any Provision of The Agricultural Marketing Agreement Act.

The preceding section of our brief has shown that the special payments to cooperatives provided for in the Boston Order do not help to solve the problem of seasonal fluctuation in the milk supply. But even if some contribution to this purpose of the Agricultural Marketing Agreement Act were demonstrable, this would not be enough to sustain the payments. Some statutory authority more explicit than a broad indication of purpose must also be found. See *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369 (1946); *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930). The necessity for such authority, always important where rule-making power has been delegated by the legislature to the executive branch of government, is made particularly acute by the origin and evolution of the milk-order provisions of the Agricultural Marketing Agreement Act.

The authority of the Secretary of Agriculture to enter "marketing agreements" with respect to milk and other agricultural commodities and to enforce such agreements by the requirement of a "license" was first conferred by two short paragraphs of the Agricultural Adjustment Act of 1933. 48 Stat. 31, 34-35 (1933). See MacFarland, *Milk Marketing under Federal Control* 8-9 (1946). These two paragraphs said nothing about the conditions under which such "agreements" were to be entered or such "licenses" were to be issued beyond referring to the "declared policy" of the Act with regard to prices and the "restoration of

normal economic conditions in the marketing of such commodities or products and the financing thereof." *Id.* at 35. In 1934 the Act was amended to permit the extension of marketing agreements to all agricultural commodities which in any way affected interstate or foreign commerce, but the amendment left in obscurity the question of what such agreements might provide. 48 Stat. 528 (1934).

By 1935 there had arisen a demand for additional amendments to the Agricultural Adjustment Act, including the explicit specification of the Secretary's powers. Numerous amendatory bills were pending in Congress when, on January 7, 1935, this Court decided *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), invalidating the petroleum provisions of the National Industrial Recovery Act on the ground that the authority delegated to the President was left too much at large. In the face of this decision, a new series of bills designed to eliminate excessive delegation under the Agricultural Adjustment Act was introduced. The culmination of this series was H.R. 8052, which restricted the authority of the Secretary with respect to marketing agreements by making explicit provision for the terms of such agreements. See 79 Cong. Rec. 9478 (1935); MacFarland, *op. cit. supra,* at 11. Debate on H.R. 8052 had scarcely gotten under way when *Schechter* v. *United States,* 295 U. S. 495, 541 (1935), holding that Congress, in entrusting to an executive department the authority to implement Congressional policy, must prescribe limitations to the department's rule-making power, was handed down. This decision,

added to *Panama Refining Co.* v. *Ryan*, made even more detailed specification of the terms of marketing agreements seem necessary. The House Committee on Agriculture accordingly proceeded to draft still another and even tighter bill designated as H.R. 8492. In the words of the Committee's report:

> "To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter et al.* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, *and specify the terms which may be included in orders dealing with the enumerated commodities.* The powers to be exercised under the proposed bill are confined within the limitations upon the Federal Authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases." H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 8 (1935).[1] (Italics supplied.)

In reporting H.R. 8492 to the House, Representative Jones of Texas, Chairman of the Committee, said:

> "We have undertaken to set out specifically just what these orders may and may not contain, thus furnishing a definite yardstick to guide the Department of Agriculture in making out the program under these 'orders'." 79 Cong. Rec. 9461 (1935).

[1] Appendix C *infra* at p. 15.

For similar statements in the course of debate by other sponsors of the bill, see 79 Cong. Rec. 9462, 9478, 9602 (1935). See also Report of the Senate Committee on Agriculture and Forestry on H.R. 8492, Sen. Rep. No. 1011, 74th Cong., 1st Sess., p. 8 (1935), which repeats the above-quoted language from the House report, and the statement to the same effect by the Committee Chairman on the floor of the Senate, 79 Cong. Rec. 11032 (1935).

The permissible terms of milk orders specified by H.R. 8492 were first made law by the Act of August 24, 1935, 49 Stat. 750, and subsequently carried over and confirmed by the Agricultural Marketing Agreement Act of 1937, where they have remained substantially unchanged. Their refined and elaborate form bears unmistakable witness to the impact of the *Panama Refining* and *Schechter* decisions. If more were needed to make clear the concern of Congress to keep within carefully defined bounds the discretionary authority of the Secretary of Agriculture, there is the opening declaration of § 8c(5):

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) [which lists additional terms and conditions]) *no others* . . . ."[8]

Similar concern is shown in the subsections conferring authority to make adjustments to the uni-

[8] Speaking of this declaration, Representative Jones said: "The provision with reference to orders plainly states that in the case of milk and its products orders may contain the following conditions and none other. I think that is just as clear as it can be." 79 Cong. Rec. 9573 (1935).

form price — § 8c(5)(A) and § 8c(5)(B) — in each of which appears the phrase "subject *only to* adjustments for . . . ."

It is against this background that the attempt to find "latitude"[9] for the challenged payments must be judged.

A. *The special payments to cooperatives are neither authorized by the provision in § 8c(5)(B)(d) for a "further adjustment" in the uniform price to producers nor assisted by the general directive in § 10(b)(1) to encourage cooperatives.*

In view of the background and carefully detailed structure of the milk-order provisions of the Agricultural Marketing Agreement Act, the petitioners do not rely wholly on generalized indications of purpose but seek some specified term of milk orders to justify the special payments to cooperatives. Although the Secretary's only statutory finding with respect to the payments failed to name any particular provision of the Act as authorizing them,[10] the petitioners now suggest that if the payments are an "adjustment" in the uniform price to all producers, they are permitted by § 8c(5)(B)(d). See Secretary's brief, pp. 74-79, Dairymen's brief, pp. 43-46. Section 8c(5)(B) permits "*only*" four adjustments. The first three are so patently unrelated to the challenged payments that the petitioners do not mention them. The fourth

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[9] See the Secretary's brief, pp. 2, 8, 15.

[10] See note 2, *supra*.

adjustment, upon which the petitioners rely, is equally unrelated. This is:

> "(d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time."

The legislative history of the "further adjustment" clause makes clear that it was intended merely to authorize the so-called "base rating plan." See, *e.g.*, H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 10 (1935);[11] Sen. Rep. No. 1011, 74th Cong., 1st Sess., p. 11 (1935). In its findings of fact the District Court described the base rating plan as one by which "each producer receives a base or quota predicated on the amount of his deliveries during a previous representative period of time. For so much of his current deliveries as are within this base or quota, he is paid a higher price than that applicable to his deliveries in excess of the quota." R. 153.[12] The District Court further found that this authorized adjustment "is entirely unrelated to any plan for payments to cooperative associations out of the equalization fund." R. 153. See also R. 42-46, 97, 128-31.

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[11] Appendix C *infra* at p. 18.

[12] This description of the base-rating plan is in accord with official publications of the Department of Agriculture. See *Stability of Milk Markets* 12 (U. S. Dept. Agric. Marketing Information Series D. M. (3), 1938); *Base Allotment or Quota Plans Used by Farmers' Cooperative Milk Associations* (U. S. Dept. Agric. Farm Credit Adm. M.R. No. 23, 1940).

The provisions of the Boston Order for special payments to cooperatives obviously do not purport to "apportion the total value of" any milk, or to have any relationship to "marketings of milk during a representative period of time." On the petitioners' own theory—that the special payments are for services and not for milk—[13] the payments are adjustments to apportion the cost of rendering services, not "to apportion the total value of the milk." The payments to cooperatives are, moreover, not made "on the basis of their marketings of milk during a representative period of time,"[14] but on the basis of their continued services. The representative period of time for their production of milk is said to be the calendar month. See Secretary's brief, p. 78. The calendar month, however, is clearly not a representative period; in the Boston milk-shed production of milk in June is almost twice that in November. R. 229; Secretary's brief, p. 27. The District Court was thus clearly right in finding the "further adjustment" under the base rating plan to be "entirely unrelated to" the special payments to cooperatives. R. 153.

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[13] See Secretary's brief, pp. 52-53; Dairymen's brief, p. 53.

[14] As first enunciated in 1935, the clause under discussion read "on the basis of their production of milk during a representative period of time." 49 Stat. 753, 755. When the provision was amended and reenacted as the Agricultural Marketing Agreement Act of 1937, the word "production" was changed to "marketing" so as to avoid any implication of the production control denounced in *United States* v. *Butler*, 297 U. S. 1 (1936). See H.R. Rep. No. 468, 75th Cong., 1st Sess., pp. 2-3 (1937).

Unable to rely with confidence upon any specific term of milk orders authorized by § 8c(5), the petitioners seek indirect support for the special payments on the basis of § 10(b)(1),[18] which directs the Secretary to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." See Secretary's brief, pp. 68, 79; Dairymen's brief, pp. 41-43. This general expression of a policy to encourage cooperatives does not grant the Secretary any additional powers. It obviously does not give him power to benefit them by providing terms of a milk order not authorized by § 8c(5), which "carefully and meticulously enumerates the exact types of provisions that may be contained in a marketing order." R. at 146, 82 F. Supp. at 617.

The special payments, moreover, are not "in harmony with the policy toward cooperative associations set forth in existing Acts of Congress." There was, and is, no policy set forth in Acts of Congress favoring the support of cooperatives by enforced contributions from non-member producers, rather than by voluntary self-help. Exemptions from anti-trust laws under the Clayton

[18] Section 10(b)(1) of the Agricultural Adjustment Act, 7 U. S. C. § 610(b)(1), was incorporated into the statute in 1935, 49 Stat. 750, by way of amendment to the Agricultural Adjustment Act of 1933, 48 Stat. 31. It was not expressly reenacted by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.

Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 17 (1946), and the Capper-Volstead Act, 42 Stat. 388 (1922), as amended, 7 U.S.C. § 291, § 292 (1946), are a far cry from "subventions . . . out of the common fund created under the Milk Orders." R. 147, 82 F. Supp. at 617. The policy of Congress has been to require equality of treatment for members and non-members. To require a non-member to become a member has been held to violate that equality of treatment requisite to tax exemption. *Farmer Union Coop. Supply Co. v. United States,* 25 F. Supp. 93 (Ct. Claims 1938). *A fortiori,* Congress would not deem it equality of treatment to require a non-member to pay for cooperative activities as if he were a member.

The legislative history of § 10(b)(1), moreover, shows that it was intended to safeguard, rather than to enlarge, existing cooperative privileges. At hearings before the Committee on Agriculture in 1935, Chester G. Davis, Administrator of the Agricultural Adjustment Act, testified as follows respecting this provision:

> "The inclusion of this language would make explicit the policy now being followed by the Agricultural Adjustment Administration but would neither extend nor limit the authority of the Secretary."[16]

In answer to a question by Mr. Kleberg, Mr. Davis further testified:

> "Mr. Kleberg. It is not proposed, then, with the idea that there be any direction, under that definition, to give a subsidy in con-

[16] Hearings before the House Committee on Agriculture on H.R. 5585, 74th Cong., 1st Sess., p. 16 (1935).

nection with the cooperatives as against the individual or the man on the outside?

"Mr. Davis. Clearly not." [17]

Mr. Davis testified to the same effect before the Senate Committee on Agriculture and Forestry. Hearings on S. 1807, 74th Cong., 1st Sess., p. 44 (1935). The House Committee reporting on the provision under discussion stated that "It is not intended by this language to discriminate against other handlers, processors or dealers . . ." See H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 13 (1935).[18]

In the Senate the sponsors of the measure assured that body that the provision in question was designed to leave intact the privileges and exemptions granted by law to cooperatives and involved no discrimination against other producers, processors, or handlers. Acting on this assurance, the Senate rejected as unnecessary an express amendment to the provision in question which would have forbidden such discrimination. See 79 Cong. Rec. 10927 (1935). The history of § 10(b)(1) thus confirms what its language implies: that it was not intended to enable the Secretary to override for the benefit of cooperatives the express limitations imposed by § 8c(5):

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[17] Hearings before the House Committee on Agriculture on H.R. 5585, 74th Cong. 1st Sess., p. 42 (1935).

[18] Appendix C *infra* at p. 92.

B. *The special payments to cooperatives are not authorized by § 8c(7)(D) permitting additional terms which are "incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."*

Failing to justify the special payments under any of the specific terms of milk orders authorized by § 8c(5), the petitioners can only point to § 8c (7)(D), which authorizes the Secretary of Agriculture to include "terms and conditions":

> "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

This language, however, looked at in the light both of its normal meaning and of its setting in the Act, expresses a relationship of subordination to the specifically enumerated terms of a milk order. As this Court observed in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 575 (1939):

> ". . . the terms of orders are limited to the specific provisions, minutely set out in § 8c(5) and (7). While considerable flexibility is provided by § 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified."

But the terms of a milk order, be it noted, do not come within § 8c(7)(D) as "auxiliary to those definitely specified" merely because they are "incidental to" the specified terms. They must also be "not inconsistent with" the specified terms. Nor is fulfillment of both of these requirements

enough without the additional showing that the terms in question are "necessary to effectuate the other provisions of" the order. In the case of the Boston Order, as we shall show, the provisions for special payments to cooperatives do not fulfill any of these criteria.

1. *The special payments to cooperatives are not "incidental to" any of "the terms and conditions specified in subsections (5), (6) and (7)."*

"The word 'incidental,' " as the District Court below pointed out,

> "means minor, auxiliary, or subordinate to a principal or primary subject. A thing incidental to an express provision is dependent or ancillary to it. The term does not comprehend something additional to and independent of the principal subject matter. It relates solely to matters of a subordinate nature inherently forming a part and parcel of the main topic." R. 147, 82 F. Supp. at 618.

The Court of Appeals borrowed the language of this Court in *First National Bank* v. *Missouri*, 263 U. S. 640, 659 (1924), to express essentially the same thought:

> " 'Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.' " Quoted at R. 484-85, 185 F.2d at 882.

On this basis both courts below held that the special payments to cooperatives are not "incidental

to" any of the terms authorized by the subsections preceding § 8c(7)(D). In the words of the District Court:

> "A provision for making substantial deductions from the equalization pool and paying them to cooperative associations, can hardly be construed as incidental to the other parts of the Order. It is entirely independent and is of major importance." R. 148, 82 F. Supp. at 618.

The correctness of this conclusion is shown by a comparison between the challenged payments and the expressly authorized terms of milk orders. These payments (a) affect the price paid to all producers, (b) purport to compensate cooperatives for marketing services to non-member producers, and (c) concern the rights and privileges of cooperatives. Each of these matters was placed by Congress in the category of major terms of an order. Adjustments to and deductions from the producers' uniform price for "location," "volume," "market," and "production" differentials, as well as for the "further adjustment" dealt with *supra* at pp. 25-27, are set forth in minute detail in § 8c(5)(B), and Congressional committees were at pains to explain the meaning of each of these authorized adjustments. H.R. Rep. No. 1241, 74th Cong., 1st Sess., pp. 9-10 (1935);[19] Sen. Rep. No. 1011, 74th Cong., 1st Sess., pp. 9-10 (1935). Appropriate service deductions from payments to producers not served by cooperatives are a subject covered with the utmost particularity in § 8c(5)(E). See pp. 51-55, *infra*. Finally, the rights

[19] Appendix C *infra* at pp. 88-89.

and privileges of cooperatives are fully spelled out in § 8c(5)(F), and in other parts of the Act. See §§ 8c(12) and 10(b)(1) and 7 U. S. C. § 671 (1946).

The petitioners, however, seek to minimize the fact that the special payments to cooperatives are of at least coordinate importance with "the terms and conditions specified in subsections (5), (6), and (7)" by reading § 8c(7)(D) as if it said "incidental to . . . the statutory scheme of regulation as a whole." To this end they refer repeatedly to the allegedly beneficial effects of the "market-wide services" supposed to be rendered by the cooperative associations, principally in processing milk in the flush season and selling fluid milk in the short season. This attempt to gain "latitude" for the payments is subject to several major weaknesses, each of which is fatal. In the first place, it depends on a reading of § 8c(7)(D) which ignores the requirement that any additional term of a milk order must be "incidental to" the specifically authorized terms, not merely incidental to the over-all scheme of the Act. In the second place, under the Order the payments are made not to compensate cooperatives for processing surplus milk or selling milk in short supply, but for other and quite distinct activities for the benefit of their members. See pp. 16-18, *supra*. Finally, even if the cooperative-payment provisions of the Order were recast to require cooperatives to maintain a supply of fluid milk and dispose of surplus, the payments would still fall outside the scope of an "incidental" term of the statutory scheme. Congress has, as we shall demonstrate, made its own choice of methods of dealing with this problem.

The Act authorizes three major categories of terms and conditions directed toward solving the problems created by seasonal fluctuation in the total supply of fluid milk:

(a) *A lower minimum class price for milk put to manufactured use.* By § 8c(5)(A) Congress authorized a lower minimum class price for milk products than for milk used in fluid form. This lower price makes it possible for handlers to buy and process surplus milk on a profitable basis. Proprietary handlers, as well as cooperatives, are thus encouraged to conduct manufacturing operations; the result is "intense competition by all handlers throughout the milk-shed for additional volumes of milk for manufacturing purposes." R. 39. Producers, in turn, being assured a demand for these purposes in the flush season, can afford to maintain herds of a size sufficient to meet the demand for fluid milk in the short season. R. 37.

(b) *A blended price to all regular producers and a lower price for the market newcomer.* The authorization in § 8c(5)(B)(ii) for a uniform blended price to all producers for milk delivered to all handlers, irrespective of the use made thereof by any individual handler, also encourages the maintenance of a reserve sufficient to meet the demand for fluid milk in the winter months. The blended price insures that producers whose milk happens to be used solely for manufacturing purposes will receive the same amount for their milk as producers whose milk is used in fluid form. R. 40. Producers who in the flush season might otherwise be forced to abandon or reduce the size of their herds because of the lower price paid by handlers for milk to be processed

are thus enabled to supplement the supply of fluid milk in the short season.

The blended price is protected against "assaults upon the price structure by the sporadic importation of milk from new producing areas" by the authorization of a term under § 8c(5)(D) which limits the price to a new producer for a minimum period of two months after his first regular delivery to that fixed for the lowest use classification specified in the order. See H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 11 (1935).[20]

(c) *Certain adjustments of the blended price.* Stabilization of production throughout the year is encouraged by the "further adjustment" clause of § 8c(5)(B), the application of which is described at pp. 25-27, *supra*. The maintenance of a reserve supply is encouraged by a second adjustment known as the "production differential" authorized by § 8c (5)(B)(a). The "production differential" was explained by the House Committee on Agriculture as follows:

> "The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the

[20] Appendix C *infra* at pp. 90-91.

market." H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 10 (1935).[21]

Among the permissible terms of orders Congress thus included appropriate and carefully considered measures for dealing with the problem of stabilizing the supply of milk. Not even the method of paying expenses incurred in carrying out these measures was left to an "incidental" power of the Secretary, but was explicitly provided for by the Act. § 10(b)(2). The Secretary has devised a new and different measure—the subsidy of cooperatives alone for processing surplus milk and maintaining reserve supplies—and decided that the funds needed to finance this subsidy shall be drawn, not from handlers or consumers, but exclusively from individual producers through a deduction in their milk prices. The inequity of this scheme is apparent when it is noted that non-member producers are not the beneficiaries of services rendered by cooperatives in maintaining a reserve supply of fluid milk for sales to proprietary handlers in short supply, but rather the purchasing handlers, the consumers and the cooperatives which sell at premium prices.

There is certainly nothing "incidental" about the economic impact of this deduction. It is, as this Court has said, "a burden on every area sale." *Stark* v. *Wickard*, 321 U. S. 288, 303 (1944). The sums of money taken from producers and paid to cooperative associations under the Boston Order have averaged one-quarter of a million dollars each year, or an aggregate to date of "$1,521,028, with

[21] Appendix C *infra* at p. 89.

an additional $419,126 in escrow under the order of the District Court in this case." See Secretary's brief, pp. 71-72.

The conclusion that Congress would not have regarded a subsidy for cooperatives as merely "auxiliary" to its comprehensive program for dealing with the milk surplus problem is reinforced by other provisions of the Act dealing with surplus problems of a different kind than that presented by milk. In the case of milk the problem is one of seasonal fluctuation in supply, and the measures prescribed by Congress are measures appropriate for meeting the special difficulties which result from such fluctuation. In the case of "other commodities," however, Congress considered that "the chief obstacle to the attainment of the declared policy is the existence of market supplies far in excess of quantities sufficient to meet an effective consumer demand." H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 11 (1935). Congress accordingly provided that a marketing order covering such a commodity might include terms and conditions for "determining the existence and extent of the surplus . . . , providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control . . . ." § 8c(6)(D). Explicit provision was also made for maintaining reserve supplies. § 8c (6)(E). The fact that Congress anticipated the need of administrative authority to deal directly with surpluses of other commodities than milk and

expressly granted such authority is doubly significant. It indicates, first, that Congress regarded as adequate in the case of a purely seasonal surplus the measures authorized in § 8c. It shows, secondly, that Congress did not regard the authorization of additional means of dealing with a surplus as merely "incidental to" other authorized means. In the case of "other commodities," moreover, Congress did not leave it open to the Secretary to impose the burden of "surplus elimination or control" on a single group of producers, but was careful to specify that this burden should be shared equally "among the producers and handlers" of the commodity. § 8c(6)(D).

Viewed under every pertinent aspect, the provision for special payments to cooperatives departs from the nature of an "incidental" term. It creates a new price adjustment, although § 8c(5)(B) carefully prescribes the only allowable price adjustments. It decrees a subsidy for cooperative associations, although the Act spells out cooperative rights and privileges. It allegedly compensates cooperatives for services not mentioned in the Order, although the Act enumerates the precise services to non-member producers for which a price deduction may be made. It is rationalized, finally, as related to the disposition of surplus milk and the maintenance of reserve supplies, although the Act places measures for dealing with these problems in the realm of major and expressly authorized terms of a marketing order.

2. *The special payments to cooperatives are inconsistent with § 8c(5) of the Act.*

The special payments to cooperatives fail to meet the next requirement of § 8c(7)(D), namely, consistency with the provisions of § 8c(5). They are inconsistent with § 8c(5) when its separate paragraphs are viewed together as integral components of a unified statutory plan. They are also inconsistent with various individual provisions of § 8c(5) standing by themselves. We deal with the charge of general inconsistency first, and then take up the repugnance between the terms of the Order and various specific provisions of the Section.

(a) *The special payments to cooperatives are inconsistent with § 8c(5) viewing its separate terms as integral parts of a unified statutory plan.*

Paragraphs (A), (B) and (C) of § 8c(5) are tightly integrated components of a statutory plan to insure the distribution to producers of the total dollar value of their milk to handlers without any diversion of that value for unspecified purposes. Paragraph (A) permits the classifying of milk in accordance with its use and the fixing of minimum prices for such use classification. The classified prices are "for milk purchased from producers or associations of producers." They "shall be uniform as to all handlers," subject only to specified price adjustments. These permissible adjustments were explained in the most minute detail by both the Senate and House Committees reporting on the bill which amended the Agricultural Adjustment Act in 1935 and enacted present § 8c(5). H.R. Rep.

1241, 74th Cong., 1st Sess., pp. 9-10 (1935);[22] Sen. Rep. No. 1011, 74th Cong., 1st Sess., pp. 9-10 (1935). See also pp. 36-37, *supra*.

Paragraph (B) then authorized the Secretary of Agriculture to distribute to producers the value of their milk fixed at the classified prices through the medium of a uniform producer price known as the blended price. The blended price can be computed either under subparagraph (B)(i) on the basis of a particular handler's utilization of milk or under subparagraph (B)(ii) on the basis of the market-wide utilization of milk, as in the Boston Order. In either event, the producer's uniform price is subject only to the very same adjustments or deviations from uniformity which are permissible in the computation of the classified prices paid by handlers with the addition only of the further base-rating adjustment described at pp. 25-27, *supra*.

The repetition by Congress in paragraph (B) of the price adjustments in paragraph (A) was not an idle form of words. Paragraph (B) was intended to provide "*Alternative methods of distributing the total dollar value of all milk sold in the market among the producers supplying the market . . .*" H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 10 (1935).[23] Congress in substance was directing the balancing of two accounts: one, debits to handlers for milk purchased; the other, credits to producers for milk sold. To avoid any discrepancies between these accounts, it meticulously listed the adjustments applicable to both. It repeated in

[22] Appendix C *infra* at pp. 88-89.
[23] Appendix C *infra* at p. 89.

paragraph (B) the same language it used in paragraph (A) in describing these adjustments to avoid any possible unbalancing factors between them. When there was an adjustment peculiar to the one account but not affecting the other, such as the base rating adjustment, it was specifically named and described as a "further adjustment." Thus there could be no leakage in the funds reflected in the handler's debit account before it reached producers.

The close working integration between paragraphs (A) and (B) was further assured by paragraph (C). Standing alone, the provisions of (B) (ii) would simply impose upon each handler the obligation to pay a uniform price for all milk delivered to him irrespective of his individual use thereof. This obligation needed to be correlated with the requirement of paragraph (A) that each handler pay on the basis of his own use of milk. To accomplish this and once more to insure that all producers in the market received the full monetary value of their milk, paragraph (C) authorized the establishment of the producer settlement fund, "to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof." The Order has always described payments into the producer settlement fund as payments *"to the producer, through the market administrator."* See *Stark* v. *Wickard,* 321 U. S. 288, 301 (1944). The fact that the aggregate amount paid into the fund by handlers must be equal to the aggregate amount payable out of the fund to producers is corroborated by the one situation in which no blending of use-classification

minimum prices is necessary. In the case of new producers, Congress provided in paragraph (D) that such producers should receive for at least two months the lowest use classification price payable by handlers under paragraph (A) subject only to the adjustments as between producers specified in paragraph (B).

Although the close interrelationship between paragraphs (A), (B), (C) and (D) closed any possible gap between the debit account of handlers and the credit account of producers, Congress recognized the possibility that there might exist a basis for service deductions from the producer's price which did not enter into the calculation of the handler's obligation. Again it manifested a determination to secure to producers the total dollar value of their product by specifying in paragraph (E) the precise services for which a deduction might be made and requiring that the deduction be "appropriate therefor."

The special cooperative payments here involved cannot be reconciled with the statutory plan of which paragraphs (A), (B), (C), (D) and (E) are integral parts. They siphon off a portion of the total monetary value of producers' milk and distribute it to private associations to which some of the producers belong. They create a discrepancy between the sums which handlers pay and which producers receive outside of the only permissible price adjustments and the only authorized price deduction. There is no dispute on this point. The Secretary concedes that "the uniform price under this method of computation does not pay to producers as much as the total class value of the milk

that is regulated by the Order." Secretary's brief, pp. 55-56. This result he justifies on the ground that there is no requirement in the Act "that the method of computing the uniform price under § 8c(5)(B) result in the payment to producers of the aggregate value of the milk computed at class prices under § 8c(5)(A) of the statute." Secretary's brief at pp. 64-65. See also *id.* at 56.

It is, therefore, the petitioners' contention that Congress, despite all its pains in repeatedly enumerating permissible price adjustments, has left a gap between the prices handlers pay and the prices producers receive as wide as administrative discretion cares to make it. As a consequence the Secretary claims the implied grant of a power to appropriate any portion of the monetary value of producers' milk fixed at the classified prices, to such purposes as he deems consonant with the general policy of the Act, even to diverting the appropriated sums into the coffers of private associations.

If § 8c(5) grants the Secretary such power, he hardly need resort to elaborate argument to fit the special payments within the express provisions of § 8c(5). He has been given something more than the conventional power to fix prices. Under this view of the Act, he has in effect the power to tax every area sale. See *Stark* v. *Wickard*, 321 U. S. 288, 303 (1944). The courts below could find in the Act no warrant for so sweeping an assumption of power by the Secretary. As the Court of Appeals said:

"The statutory purpose (as to producers) is to secure to producers at least the fixed

minimum price less only the costs of administration and qualified by individual producer differentials (such as quality of milk, location, *et cetera*) (§ 608c(5)(A)). R. 482, 185 F.2d at 880. See also R. 146-47, 82 F. Supp. at 617.

It is highly improbable that, having guarded the monetary value of the producers' milk from unspecified administrative diversions as the money comes in from handlers and as it goes out to producers, Congress nevertheless intended to leave the fund entirely unprotected from such diversions immediately after it comes in, and immediately before it goes out. Viewing the key provisions of § 8c(5) together as an integrated whole, we submit that they forbid any implication of power in the petitioner to divert a portion of the monetary value of producers' milk by way of the special payments to cooperatives, and that these payments are as a consequence inconsistent with § 8c(5).

(b) *The special payments to cooperatives are inconsistent with the requirement of § 8c(5)(A) for payment by all handlers of uniform classified prices.*

The minimum prices fixed for each use classification of milk under § 8c(5)(A) must be uniform as to all handlers. Adjustments are permissible for volume, market, and production differentials, the grade or quality of milk purchased, and the locations in which it is delivered. § 8c(5)(A); H.R. Rep. No. 1241, 74th Cong., 1st Sess., pp. 9-10 (1935).[24] No adjustment is permissible, however, for individual operating costs. If a given handler

[24] Appendix C *infra* at pp. 88-89.

in maintaining a reserve supply of milk or manufacturing surplus milk, has unusually high costs, the Secretary cannot treat him as a special case, and reduce his individual price below the price applicable to him and all other handlers.

The Boston Order, as amended, has always purported to provide uniform classified prices for milk in apparent conformity with the Act. See § 904.7. But the Record in this case reveals, R. 73-74, and the Secretary's brief, at p. 39, confirms the revelation, that the special payments to cooperatives were promulgated by the Secretary in order to rebate to this group of handlers a portion of the uniform price for Class II milk. Prior to the cooperative-payment amendment, the Order had reflected in the Class II price an allowance of 26 cents per hundredweight to defray the cost of handling surplus milk. R. 73-74. Evidence was received at the 1941 hearings intended to justify both an increase and a decrease in this allowance. This conflicting evidence showed that costs vary considerably among plants. Summarizing this evidence, a senior marketing specialist in the War Food Administration deposed on behalf of the Secretary:

> ". . . in terms of the existing system of a single rate to all plants, it [the evidence] was inconclusive as to making an independent change either up or down. However, because of the relatively high costs shown for cooperative plants which serviced the irregular demands for Class I milk by distributors, the single rate then being allowed for all plants appeared unequitable. Therefore, a lower uniform handling rate, together with a pool

> payment to compensate for the extraordinary high costs of operating cooperatives for servicing the market appeared fair." R. 74.

Thus, it appears quite conclusively that the special payments here in issue are a form of rebate to cooperatives of a portion of the uniform Class II price. The Secretary could not lawfully vary with respect to cooperatives "the existing system of a single rate to all plants" handling Class II milk. This would have meant the fixing of a separate Class II price for the milk of cooperative handlers, a palpable violation of the Act. He therefore sought to accomplish indirectly what he could not do directly. He lowered the existing handling allowance on Class II milk to all handlers, proprietary and cooperative, from 26 cents to 21½ cents per cwt., R 73, but coupled that lower uniform allowance with a special payment to cooperatives alone "to compensate for [their] extraordinary high costs." R. 74. The Secretary's brief, at p. 39, puts the matter very plainly:

> "The change in the Class II price was made in specific contemplation of one of the effects which it was anticipated would flow from the cooperative payment provision."

The respondents submit that the cooperative payments, being in substance a form of rebate to one group of handlers of a portion of the uniform Class II price, are in conflict with the plain requirement of § 8c(5)(A) that minimum class prices paid by handlers "*shall be uniform as to all handlers.*"

(c) *The special payments to cooperatives are inconsistent with the requirement of § 8c(5)(B) for the payment to all producers of uniform prices.*

The term authorized by § 8c(5)(B)(ii) provides "for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered." The payments are subject *"only to"* enumerated adjustments. The Boston Order purports to provide for the payment to all producers of uniform prices. § 904.9. In reality, however, it does not.

In the computation of the price to producers, the total value of the milk in the pool is reduced by the challenged deduction before it is divided by the total quantity of milk to obtain "the basic blended price." § 904.8(b)(5). All producers, it is true, receive the basic blended price. § 904.9. Only cooperative associations of producers, however, receive the amount of the challenged deduction. § 904.10. Consequently, producers who are members of such associations receive a proportionately greater share of the total value of the milk in the pool than non-member producers.

The fact that all producers receive the same blended price does not, as the petitioners contend (Secretary's brief, p. 53; Dairymen's brief, p. 54), result in compliance with the statutory requirement of "uniform prices." This requirement cannot be assumed to be merely one of form. The variation from uniformity would be more apparent but no different in its impact on producers if the

challenged deduction were made by a direct subtraction from the blended price after it had been computed rather than from the total value of the milk in the pool. The validity of the deduction can scarcely depend upon the administrative choice of the mathematical process for computing the blended price to producers. If the deduction for such payments would not be valid when made after computation of the blended price, it cannot be valid because made before computation of the price.

The "uniform prices" to producers required under paragraph (B) are subject "only" to specified adjustments. The special payments are not within these adjustments. The Secretary contends, however, that since the special payments are *for services*, they are not variations or adjustments in the prices *for milk*. Secretary's brief, pp. 52-55. This is a distinction without a difference. Many of the adjustments in the uniform price authorized by paragraph (B) reflect services by the individual producers. This is clearly illustrated by the following statement of the House Committee on Agriculture reporting on the bill which amended the Agricultural Adjustment Act in 1933 and enacted the present § 8c(5)(B):

> "The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their

milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

"The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H.R. Rep. No. 1241, 74th Cong., 1st Sess., pp. 9-10 (1935).[28]

Even the "further adjustment" authorized by paragraph (B), discussed at pp. 25-27, *supra*, is a differential to compensate producers for what is actually a market service, *i.e.*, maintaining their deliveries at or near a constant level. The alternative reliance by the petitioners on this "further adjustment" reveals the artificiality of a distinction between adjustments for services and adjustments in prices. So far as the producer's milk check is concerned, there is no distinction. Nor is

[28] Appendix C *infra* at pp. 88-89.

there any from the point of view of statutory authority to require the deduction. The net result of both is a differential in the price for milk.

There can be no doubt that producers who are members of cooperative associations benefit by this unauthorized price differential even though the special payments are, as the petitioners point out, to their corporate entities rather than directly to them. See Secretary's brief, p. 53; Dairymen's brief, p. 54. As the Court of Appeals recognized, "The reason for the existence of cooperatives is to make as much money for their producer-members as possible." R. at 476, 185 F.2d at 876.

The respondents submit, therefore, that the special payments are repugnant to § 8c(5)(B) providing for the payment "to all producers and associations of producers" of "uniform prices" subject "only to" the enumerated adjustments.

(d) *The special payments to cooperatives are inconsistent with the provision of § 8c(5)(E) for deductions from payments to individual producers for services rendered to them by the Market Administrator.*

The petitioners protest that as the cooperative payments are for services, the Court of Appeals erred in holding that they vary the uniform price paid for milk. As we have seen, however, the fact that the special payments are for services does not mean that they are consistent with either the statutory plan of § 8c(5) or with the particular terms authorized by paragraphs (A) and (B) of § 8c(5). See pp. 40-51, *supra*. They are, more-

over, obviously repugnant to § 8c(5)(E), which permits a term:

> "Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers . . ."

Thus, producers who are not members of cooperatives may be required to pay whatever it may cost the Market Administrator to furnish them the enumerated services.

The Boston Order, however, requires non-member producers to pay cooperatives for services enumerated in § 8c(5)(E) which are rendered not to them but only to the members of cooperatives. So far as these services are concerned, a cooperative association need only "check the weights and tests of milk which *its members* deliver" and maintain a staff "for providing information *to its members*" to be entitled to claim the benefit of an assessment levied on *non*-members. § 904.10(a)(3), (5).

Any other service rendered by cooperative associations which may indirectly benefit non-member producers are not among the services enumerated in paragraph (E). That paragraph permits only those deductions which are "appropriate" for the enumerated services. To the extent, therefore, that the contested deduction rests on the basis of such "market-wide services" as hand-

ling surplus milk and selling fluid milk to proprietary handlers, it rests on services distinctly different from the "kind of market services for which deductions from payments" to non-member producers may be made. See Court of Appeals Opinion, R. at 483, 185 F.2d at 881. Here, surely, is a palpable inconsistency between the Act and the Order.

Consideration of the purpose of paragraph (E) illuminates the extent of this inconsistency. We begin with the fact that Congress put cooperative members and non-members in distinct categories. Why? The answer may be found in § 8c(5)(F). That paragraph expressly protects the power of cooperative associations to distribute the proceeds of their sales in accordance with their contracts with their members. Under such contracts, cooperatives can see to it that they are compensated for whatever services they may render to their members. It was unnecessary, therefore, for Congress to make special provision assuring either that these services should be rendered to the members of cooperatives or that, if rendered, such services would be paid for.

In the case of non-member producers, however, it was recognized that it might be desirable to authorize the Secretary to render them similar services. The Senate accordingly inserted in paragraph (E), after H.R. 8492 had come from the House, a term providing for the rendition by the Market Administrator of specified tangible services to non-member producers. See 79 Cong. Rec. 11134 (1935). Having done this, the Senate also granted authority to the Secretary to require a deduction

from prices payable to non-member producers in order to compensate him for such services.

In obvious recognition of this statutory scheme, the Secretary provided in the Boston Order, prior to the insertion of the cooperative payment provision in 1941, for the rendition by the Market Administrator to non-members of the services enumerated in paragraph (E) and for appropriate deductions from payments by handlers to non-members, such deductions to be paid over to the Market Administrator. 7 Code Fed. Regs. § 904.10 (a) (1939). He further provided that "In the case of producers for whom a cooperative association . . . is actually performing . . . the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deductions specified in paragraph (a) of this section, such deductions from the payments to be made direct to such producers, pursuant to § 904.9, as are authorized by such producers and . . . pay over such deductions to the associations rendering the service." 7 Code Fed. Regs. § 904.10(b) (1939). These provisions for payment by non-members for services rendered by the Market Administrator and for payment by members for services rendered by their cooperatives were entirely consistent with § 8c(5), paragraphs (E) and (F). See R. 121-22.

The Market Administrator is still required to furnish to "producers, consumers and handlers, statistics and information concerning the operation of" the Order, although no deduction is demanded. § 904.2(d)(7). The Order now makes no provision, however, for furnishing to non-member producers, either by the Market Administrator

or anyone else, the other services specified in paragraph (E). Now the members receive the services and the non-members pay for them.

Therefore, in so far as the services alleged to justify the assessment of non-member producers are services enumerated by paragraph (E), the assessment is based on services not rendered to such producers and not rendered by the agency contemplated by that paragraph. And in so far as the services alleged to justify the assessment are services not enumerated by paragraph (E), the assessment has no basis in law. On either ground, the assessment is "inconsistent with the terms and conditions specified in" that paragraph.

3. *The special payments to cooperatives are not "necessary to effectuate the other provisions of" the Order.*

The question whether the provision for payments to cooperatives in issue is "necessary" to carry out the other provisions of the Order is not reached until after a showing that this provision is "incidental to" and "consistent with" the Act.[26] The courts below properly concluded that the contested payments are neither "incidental to" nor "not inconsistent with" the Act. These two conclusions are more than sufficient to support their holdings that the payments are invalid. However, the additional conclusion of the courts below that the payments are not "necessary to effectuate the other provisions of" the Order is sufficient by

[26] Judge Edgerton, dissenting in the Court of Appeals, R. 487, 185 F.2d at 884, seems virtually to have disregarded the "incidental to and not inconsistent with" requirements.

itself to support their holdings. The Court of Appeals said:

> "That the payment is not 'necessary' is clear from the evidence in this record. The evidence is as follows. The purpose of cooperatives in furnishing these services is to benefit their members. It is impractical, if not impossible, to provide these services to the market for the benefit of members without also benefiting other producers in the market. The cooperatives have been providing these services for many years — long before any regulation of milk marketing by the Congress. There has been no material change therein since such regulation. They can so continue without these payments." R. 485, 185 F.2d at 882.

Indeed, the Court of Appeals went further than it was required to go in searching for evidence in the record of various services which cooperatives render outside of the limited services required by the Order. It is the necessity of the services required by the Order rather than the necessity of the market-wide services which the Order ignores that presents the focal point of inquiry. A showing that the provisions of a hypothetical order compensating for market-wide services would be necessary to effect other provisions of such an order has no tendency to prove that the existing special-payment provisions of the Boston Order, with their complete elimination of market-wide services from the criteria of eligibility, are necessary to effectuate its other provisions.

Even if certain cooperative activities not required by the Order do indirectly benefit non-members, special payments for such activities are not,

as the Court of Appeals properly concluded, necessary to the continuance of such activities. It is true, of course, that the "word 'necessary' . . . has always been recognized as a word to be harmonized with its context." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 129-30 (1944). But it is also true that a finding of necessity cannot foreclose inquiry whether the statutory standard of necessity has been met. Cf. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607 (1944).

The principal activities relied upon by the petitioners are those of manufacturing surplus milk in the flush season and providing a reserve supply of fluid milk during the short season. Such activities, as we have already pointed out, are undertaken for business reasons. See pp. 19-20, *supra*. Cooperative handlers can and do recover in the normal channels of trade, through the prices charged in selling fluid milk, the cost of any alleged service in maintaining a standby supply of milk. R. 38, 104, 123. As the petitioners have admitted, R. 92, 93, there is no limitation on the maximum price cooperatives may charge for milk sold by them to proprietary handlers. See also R. 105-06.

The Secretary's assertions that cooperatives incur losses in handling surplus milk are not warranted by the record. See Secretary's brief, pp. 32, 34. It is true that manufacturing surplus costs cooperatives money, just as it costs proprietary handlers money; but the record shows neither the amount of receipts by cooperatives on sales of manufactured milk nor their net profits or losses on such sales. In fact, it was admitted by George Thompson, an expert representative of the Bellows

Falls Cooperative Creamery, that he had never seen a profit and loss statement with respect to the cooperative's surplus operations based on Class II prices. R. 195-96. Rather than indicating a loss on surplus operations, what evidence there is indicates that in view of the lower Class II price, manufacturing surplus is thoroughly profitable, R. 39, 107, 169, particularly as it enables cooperatives to maintain a reserve supply of fluid milk which they can sell at a premium in the short season.[27] Moreover, in recent years operating cooperatives in the Boston milkshed have "not been burdened with the difficulties arising from surplus milk production. The cooperative associations have enjoyed the superior bargaining position of a seller of a short commodity. This economic condition has removed the necessity for certain cooperative expenditures." 12 Fed. Reg. 1169 (1947).

In recognition of the fact that the special payments might easily supplement cooperatives' profits from handling surplus, rather than reduce their losses, the Secretary's representative and economist suggested at the original hearing, R. 14, that any payments to cooperatives must be surrounded with certain "necessary" conditions: they must sell milk to other handlers at the Class I price without a premium; maintain the availability of their supplies, free from the ties of long-term contracts; and willingly accept all milk without a market. R. 198, 199. The special-payments

[27] See the frank statement by witness Thompson: " . . . we want to stand ready to supply fluid milk. I am not trying to represent that our motives in that respect are entirely benevolent. They are in the interest of our members . . . " R. 200. See also R. 38, 104, 106, 118, 123, 374, 419.

provisions of the Order, however, attach no such conditions to the receipt of payments.

The "other services" relied upon by the petitioners (see Secretary's brief at pp. 40-45; Dairymen's brief at pp. 35-36), were treated by the Court of Appeals as aids to all participants in the market. This, however, does not make it necessary that they be subsidized with milk producers' money. The dealer who expands the consumer demand for fluid milk, the Dairy Council which advertises milk and dairy products, the Dairy Herd Improvement Associations, the State Agricultural Colleges, all engage in activities which are beneficial to producers, handlers, and consumers. Of similar market-wide benefit was the service of the Boston Milkshed Price Committee, appointed by the Market Administrator in 1947 to make an extensive study of how best to establish Class I prices, in recommending a price formula which was included, with some modifications, in amendments to the Order. 13 Fed. Reg. 1520 (1948). Harvard University, the New England Research Council on Marketing and Food Supply, the University of Vermont, and several proprietary handlers were represented by economists on the Committee. None of these institutions was compensated by a deduction from the producer equalization fund. The Secretary argues, however, that the special payments to cooperatives are justified in part as compensation for such activities as permitting two of their staff economists to act as members of the Committee. See Secretary's brief, p. 42. Once the statutory concept of a "necessary" term is thus expanded to justify compensation for the manifold

activities which may be of "aid to all participants in the marketing area," the producer settlement fund becomes a sort of Agricultural Community Chest.

In *State* v. *Dairy Distributors, Inc.*, 217 Wis. 167, 258 N. W. 386 (1935), the Supreme Court of Wisconsin had before it the validity of a State milk order provision requiring that all dealers and producers contribute one-half cent per hundred pounds to the Milwaukee Dairy Council. The basic statute authorized, *inter alia*, the fixing of price schedules for milk and cream and gave an administrative board power "to do all things reasonably necessary and convenient" to carry out the provisions of the Act. The Court held that the board's action in ordering a contribution to the Dairy Council was invalid. The Court said:

> "If the legislature intends to confer upon administrative bodies the power not only to fix just and reasonable prices for milk and cream, but also the power to set up independent agencies for the promotion of the business aspects of the industry and compel all persons selling milk in the metropolitan area to contribute, that intent should be expressed in clear and unmistakable terms. . . . It is clear that the legislature has attempted to confer no such power upon the commission by sec. 99.165." *Id.* at 174, 258 N. W. at 389.

So here, the power to fix prices does not include as a necessary incident the power to compel nonmember producers to contribute to cooperatives for whatever services may tend to stabilize prices. This, we submit, is no harsh reading of the word "necessary."

III. Neither Amendatory Action by Congress Nor Administrative Construction of the Act Furnishes Support For The Special Payments To Cooperatives.

There can be no doubt that where the interpretation of ambiguous terms of a statute is in issue, the interpretation put upon them by the agency charged with administration of the statute is entitled to considerable weight. Where the power of the agency is in issue, however, such a construction must be more narrowly scrutinized. In the words of Mr. Justice Brewer speaking for this Court:

> "... it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it." *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry.*, 167 U. S. 479, 510 (1897). See also *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368-69 (1946).

We have shown that the history and structure of the milk-order provisions of the Agricultural Marketing Agreement Act forbid a loose construction of those provisions. We have also shown that the special payments to cooperatives are neither authorized by any of the enumerated terms and conditions of milk orders nor justifiable as "incidental to" and "not inconsistent with" such terms and conditions. Nothing in the administrative construction of the Act by the Department of Agriculture or in amendatory action by Congress gives reason to question these conclusions.

A. *Renactment in 1937 of the Act of 1935 did not inject among the permissible terms of future milk orders all the terms of agreements, orders, and licenses then or theretofore in effect.*

Congressional approval of payments to cooperatives cannot, we submit, be inferred from its action in ratifying and confirming by the Agricultural Marketing Agreement Act of 1937 all milk orders, marketing agreements, and licenses theretofore issued and then outstanding. Congress was merely concerned, in view of the doubt cast on the validity of the Agricultural Adjustment Act as a whole by the decision in *United States* v. *Butler*, 297 U. S. 1 (1936), with safeguarding rights and privileges that had already attached. See H.R. Rep. No. 468, 75th Cong., 1st Sess., pp. 2, 4 (1937); MacFarland, *Milk Marketing under Federal Control* 12-14 (1946). Congress may also have wished to preserve the effectiveness of such agreements and licenses despite their possible inconsistency with later, more specific, enactments. It is certain, at any rate, that the attention of Congress had not been drawn to the precise terms and conditions of all the milk marketing agreements and licenses which then happened to be in effect. Under such circumstances, "ratification" can impress no constructional gloss on the reenacted language of a statute. See *Commissioner* v. *Church*, 335 U. S. 632, 647 (1949); *FCC* v. *Columbia Broadcasting System*, 311 U. S. 132, 137 (1940); Note, 59 Harv. L. Rev. 1277, 1285-86 (1946). This is true, *a fortiori*, of agreements and licenses promulgated not under the specific terms of the Act of August 24, 1935, 49 Stat. 750, re-enacted in 1937, but the vague lan-

guage of the Act of May 12, 1933, 48 Stat. 31, 34-35, abandoned in 1935. See p. 24, *supra*.

In the case, for example, of the Twin City agreement and license, discussed at pp. 62 and 81-82 of the Secretary's brief, it cannot be assumed that Congress regarded the price rebates there provided for as consistent with the uniform price to all producers demanded by § 8c(5) of the Agricultural Marketing Agreement Act. There would have been no point in spelling out the permissible terms of future orders if whatever provisions happened to be contained in outstanding orders could be transferred to every new order thereafter promulgated. Nor can the Committee reports cited by the petitioners (Secretary's brief, pp. 63, 83; Dairymen's brief, p. 23) be construed as meaning that Congress thought that it had provided authorizing language for every term of every agreement then in existence. On the contrary, the reports make plain that the draftsmen of § 8c(5) turned to existing agreements merely as a source of appropriate terms and conditions to be enumerated in the Act; the sentence quoted in part on p. 83 of the Secretary's brief is preceded by the sentence: "Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products." H.R. Rep. No. 1241, 74th Cong., 1st Sess., p. 9 (1935); Sen. Rep. No. 1011, 74th Cong., 1st Sess., p. 9 (1935).

Both the Twin City "service charge" and the payment required by the St. Louis Order cited at p. 82 of the Secretary's brief, moreover, in-

[28] Appendix C *infra* at pp. 87-88.

volve payments by a handler proportionate to services determined by the Secretary to be rendered to him by a cooperative. In this respect the payments differ markedly from the imposition of a flat levy on all non-member producers for the benefit of all cooperative associations. This being so, these orders furnish no precedent for the challenged provisions of the Boston Order irrespective of Congress's action in confirming them.

B. *The failure of the proposed amendment of 1940 tends, if anything, to show that Congress did not intend the Secretary to have authority to require special payments to cooperatives.*

We do not see how the attempt in 1940 to amend the Act so as to authorize payments to cooperatives, referred to on pp. 84-85 of the Secretary's brief and pp. 27-28 of the Dairymen's brief, helps the petitioners. The amendatory bill — S. 3426, 76th Cong., 3d Sess. (1940) — failed of passage, although the Secretary requested its enactment. Naturally, its proponents were guarded and self-serving as to the Secretary's existing powers, inasmuch as the cooperative payments of the New York Order had already been challenged in the Courts. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939). As the District Court below realistically observed, "It seems clear that the Secretary must have had some doubt as to his power in this matter. Else he would not have asked for supplemental legislation expressly conferring such authority." R. at 149-50, 82 F. Supp. at 619. In any event, statements by the sponsors of proposed amendatory legislation which fails do not

indicate the intention of Congress in enacting the basic statute years before. Indeed, the fact that a bill to amend fails of passage usually indicates legislative disapproval of its terms. *FTC* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941); *Carey* v. *Donohue*, 240 U. S. 430, 437 (1916).

The terms of S. 3426, moreover, themselves contradict the contention that the bill was merely declaratory of the Secretary's existing powers. If the Secretary has any such powers, they are conferred, according to the petitioners, by § 8c(7)(D) or perhaps by § 8c(5)(B); the amendment, however, would have included authority to make special payments to cooperatives among the other substantive terms of § 8c(5)(C). The amendment would also have created explicit legislative standards regulating the nature of the services involved and handlers' qualification for payments. Inconsistently, moreover, with the claims here asserted that market-wide services are peculiar to cooperative associations, the proposed legislation would have permitted proprietary handlers to draw payments out of the pool for diverting surplus milk in periods of excess supply, and for furnishing fluid milk in times of insufficient supply. See Hearings before the Senate Committee on Agriculture and Forestry on S. 3426, 76th Cong., 3d Sess., p. 53 (1940), quoted at R. 124.

The District Court thought that the history of S. 3426 supported our position, R. at 149-50, 82 F. Supp. at 619; the petitioners think that it looks the other way. We, of course, incline to agree with the District Court, but find it difficult, nevertheless, to escape the conclusion reached by the Court of Appeals:

"We conclude that this subsequent legislative history is no assistance in construing the Act." R. at 487, 185 F.2d at 883.

C. *Administrative action under the Act of 1937 has not enlarged its proper construction.*

The petitioners advance several isolated instances of deductions from the equalization pool under various orders as constituting an administrative construction of the Act of 1937 consonant with the challenged deduction for the special payments. See Secretary's brief, pp. 57-61, 86-88; Dairymen's brief, pp. 29-32. These other deductions, however, are not only few in number but readily distinguishable from the contested deduction.

The simple deduction for a cash reserve to maintain the solvency of the equalization fund,[29] for example, cited in the Secretary's brief at pp. 59-60, is clearly "incidental to, and not inconsistent with" § 8c(5)(C) "and necessary to effectuate the other provisions of" the Order. It was, moreover, sharply distinguished from the deduction here involved when this case was before this Court in 1944:

> "Apparently this deduction for payments to cooperatives is the only deduction that is an unrecoverable charge against producers. The other items deducted under § 904.7(b) are for a revolving fund or to meet differentials in price because of location, seasonal delivery, *et cetera.*'"[30] *Stark* v. *Wickard*, 321 U.S. 288, 301 (1944).

[29] § 904.8(b)(7).

[30] § 904.7(b) of the Order referred to in the quotation is now § 904.8(b).

The deduction for a cash balance was described by this Court as a "revolving fund" because the unreserved cash on hand after the end of the month is added back into the fund. § 904.8(b)(3). This deduction, therefore, is not forever lost to non-member producers as is the deduction for cooperative payments; its payment is merely deferred by one month.

The former provision of the Boston Order[31] for the exclusion from the computation of the blended price of the milk of handlers who were in default in the required "equalization payments," cited in the Secretary's brief at p. 61, was merely another means "to minimize the risk that the equalization pool will fail to be self-liquidating for a particular delivery period on account of defaults by handlers obligated to the pool." *Green Valley Creamery* v. *United States*, 108 F.2d 342, 345 (1st Cir. 1939). Like the deduction for a cash reserve, it merely deferred payment to producers of the amounts owed them by handlers and was justified as incidental to § 8c(5)(C) and necessary to effectuate the related provisions of the Order.

The deduction for "seasonality payments" under the Louisville Order,[32] cited in the Secretary's brief at pp. 60-61, 87, is not only a form of "production differential" within the meaning of §§ 8c(5)(A) and (B) but is also expressly authorized by the "further adjustment" clause of § 8c(5)(B), which was designed to permit a price adjustment reflecting the producer's "marketings of milk during a

[31] 7 Code Fed. Regs. § 904.8(h) (1939).
[32] 7 Code Fed. Regs. §§ 946.7(b)(3) (Supp. 1950) and 7 Code Fed. Regs. § 946.8(d)(2) (1949); Secretary's brief, p. 47.

representative period of time." See pp. 25-27, *supra*. Payment to producers of this authorized deduction is simply deferred from spring to fall.

The former subtraction under the Lowell-Lawrence Order[33] of any amounts which a handler might be required to pay pursuant to the Boston Order for outside milk, cited in the Secretary's brief at p. 60, was obviously necessary to prevent the price of a producer's milk from being regulated under two Orders. Producers of the milk involved do not lose the amount deducted; it is merely regulated under another order. Thus, neither this deduction, nor the deductions for a cash reserve or for the Louisville "seasonality payments", is what this Court has described as a "deduction that is an unrecoverable charge against producers." See *Stark* v. *Wickard*, 321 U. S. 288, 301 (1944).

The "diversion payments" in effect under the New York Order only from 1938 to 1942[34] were another isolated instance cited by the petitioners of what is alleged to be a well-established administrative interpretation of the Act. See Secretary's brief at pp. 58-59, 87. The statutory basis for these short-lived payments was not questioned in *Grandview Dairy* v. *Jones*, 157 F.2d 5 ((2d Cir. 1946), wherein a handler unsuccessfully sought to compel the Administrator to pay him for an alleged diversion of excess milk. If it had been, the payments might have been justified either as an authorized method of establishing a lower class

[33] 7 Code Fed. Regs. § 934.9(b)(2) (1949).

[34] 7 Code Fed. Regs. § 927.8(f) (Supp. 1938).

price for milk manufactured into by-products after diversion and transportation from the plant of original receipt, or as a species of "location differential" expressly authorized by § 8c(5)(A) of the Act. In contrast to the challenged special payments to cooperative associations of producers, the diversion payments were made to all qualified handlers. They were thus consistent with the requirement of § 8c(5)(A) that the minimum prices paid by handlers "be uniform as to all handlers."

In one striking respect, therefore, all of the deductions cited as instances of administrative construction differ from the payments to cooperatives. None takes away money from one group of producers and then disburses the resultant funds to another group of producers or to a certain group of handlers, making the payment dependent exclusively upon the corporate character of the recipient as a cooperative association serving its members. Each, moreover, has a "reasonable basis in law." In view of these facts, and the added fact that only the obviously authorized deductions for a cash reserve and the Louisville seasonality payments are now in effect, it is clear that these deductions fail to establish a well-settled administrative construction of the Act consistent with the contested deduction for payments to cooperatives.

Provisions for cooperative payments more nearly comparable to the provisions here in issue certainly do not have the status of settled administrative construction of the Agricultural Marketing Agreement Act of 1937. The construction in question, in the first place, was "neither uniform, general, nor long-continued." *Iselin* v. *United*

States, 270 U. S. 245, 251 (1926). No sooner had the first cooperative-payment provisions purporting to rest on the Agricultural Marketing Agreement Act appeared in the New York Order than they were challenged in proceedings which eventually came before this Court. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939). The provisions for cooperative payments under the Boston Order were promulgated less than two years after it had been held in the *Rock Royal* case that handlers lacked standing to complain of such payments; the payments under the Boston Order were promptly attacked by the respondents here. But for a brief interval, therefore, there has not been a moment since the payments were first required when they have not been vigorously contested as exceeding the power conferred on the Secretary of Agriculture by the Agricultural Marketing Agreement Act. Symptomatic of their precarious status is the fact that only four of the thirty-nine presently outstanding Federal Milk Orders contain provisions for cooperative payments. 7 Code Fed. Reg. c. IX (Supp. 1949 and 1950). A ruling so continuously under attack and so seldom acted upon "has hardly seasoned or broadened into a settled administrative practice." *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).[35]

A second reason why no weight can be given to an alleged "administrative construction" is that

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[35] Congress' disclaimer in the Agricultural Act of 1948, 62 Stat. 1258 (1948), of intention to make necessary any amendment of existing agricultural programs does not, of course, signify that Congress meant affirmatively to endorse all such programs.

there has been no such construction in any true sense, but rather an effort after the event to find a statutory rationalization of a course of action already determined upon. At one time it was the position of the Department of Agriculture that the payments were authorized by the further adjustment under § 8c(5)(B)(d). See R. 28, 42-46, 128-31; Report of the Acting Director of Food Distribution, 9 Fed. Reg. 3057-60 (1944). The Secretary's main reliance is now placed on § 8c(7)(D) supplemented by § 10(b)(1). Such a history reflects not a settled administrative construction but a settled determination to justify the payments.

In view of the foregoing considerations, the Court is constrained to analyze the terms of the Act without the help of any authoritative administrative construction. Such an analysis, we submit, requires the conclusion that Congress conferred upon the Secretary of Agriculture no power to divert funds from the producer equalization pool to the benefit of one group of producers.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

The following are relevant extracts from the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.* (1946), reenacting, amending and supplementing the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended by the Act of August 24, 1935, 49 Stat. 750:

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2)

of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality

of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at

which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsec-

tion (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of [other commodities], orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

* * * * *

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsec-

tions (5), (6), and (7) and necessary to effectuate the other provisions of such order.

* * * * * *

SEC. 10(b)(1). * * * The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

APPENDIX B

The following are the relevant sections of the Boston milk order, as amended, 12 Fed. Reg. 4921 (1947), 7 Code Fed. Regs. §§ 904.8—904.10 (1949):

§ 904.8 *Minimum blended prices to producers*—(a) *Computation of value of milk received from producers.* For each month, the market administrator shall compute the value of milk received from producers which is sold, distributed, or used by each pool handler, in the following manner:

(1) Multiply the quantity of milk in each class by the price applicable pursuant to § 904.7 (a) and (b);

(2) Add together the resulting value of each class; and

(3) Adjust the value determined in subparagraph (2) of this paragraph as provided in § 904.7(e).

(b) *Computation of the basic blended price.* The market administrator shall compute the basic blended price per hundredweight of milk delivered during each month in the following manner:

(1) Combine into one total the respective values of milk, computed pursuant to paragraph (a) of this section, for each pool handler from whom the market administrator has received at his office, prior to the 11th day after the end of such month, the report for such month and the payments required pursuant to § 904.9(b)(2) and (g) for milk received during each month since the effective date of the most recent amendment of this subpart;

(2) Add the total amount of payments required from handlers pursuant to § 904.9(g);

(3) Add the amount of unreserved cash on hand at the close of business on the 10th day after the end of the month from payments made to the market administrator by handlers pursuant to § 904.9;

(4) Deduct the amount of the plus differentials, and add the amount of the minus differentials, which are applicable pursuant to § 904.9(e);

(5) Subtract the total amount of cooperative payments required by § 904.10(b);

(6) Divide by the total quantity of milk for which a value is determined pursuant to subparagraph (1) of this paragraph; and

(7) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in § 904.9. This result shall be known as the basic blended price for milk containing 3.7 percent butterfat.

* * * * * *

§ 904.9 *Payments for milk*—(a) *Advance payments.* On or before the 10th day after the end of each month, each pool handler shall make payment to producers for the approximate value of milk received during the first 15 days of such month. In no event shall such advance payment be at a rate less than the Class II price for such month. The provisions of this paragraph shall not apply to any handler who, on or before the 17th day after the end of the month, makes final payment as required by paragraph (b)(i) of this section.

(b) *Final payments.* On or before the 25th day after the end of each month, each pool handler shall make payment for the total value of milk received during such month as required to be computed pursuant to § 904.8 (a), as follows:

(1) To each producer at not less than the basic blended price per hundredweight, subject to the differentials provided in paragraphs (d) and (e) of this section, for the quantity of milk delivered by such producer; and

(2) To producers, through the market administrator, by paying to, on or before the 23d day after the end of each month, or receiving from the market administrator, on or before the 25th day after the end of each month, as the case may be, the amount by which the payments required to be made pursuant to subparagraph (1) of this paragraph are less than or exceed the value of milk as required to be computed for such handler pursuant to § 904.8(a), as shown in a statement rendered by the market administrator on or before the 20th day after the end of such month.

* * * * *

§ 904.10 *Payment to cooperative associations*—(a) *Application and qualification for cooperative payments.* Any cooperative association of producers duly organized under the laws of any state may apply to the Secretary for a determination that it is qualified to receive cooperative payments in accordance with the provisions of this section. Upon notice of the filing of such an application, the market administrator shall set aside for each month, from the funds provided by handlers' payments to the market administrator pursuant to § 904.9, such amount as he estimates is ample to make payment to the applicant, and hold it in reserve until the Secretary has ruled upon the application. The applicant association shall be considered to be a qualified association entitled to receive such payments from the date fixed by the Secretary, if he deter-

mines that it meets all of the following requirements.

(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

(6) It constantly maintains close working relationships with its members.

(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers.

(8) It is in compliance with all applicable provisions of this subpart.

(b) *Cooperative payments.* On or before the 25th day after the end of each month, each qualified association shall be entitled to receive a cooperative payment from the funds provided by handlers' payments to the market administrator pursuant to § 904.9. The payment shall be made under the conditions and at the rates specified in this paragraph, and shall be subject to verification of the receipts and other items upon which such payment is based.

(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9(b)(2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate.

(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association.

(c) *Reports relating to cooperative payments.* Each qualified association shall, upon request by the market administrator, make

reports to him with respect to its use of cooperative payments and its performance in meeting the requirements set forth as the basis for such payments, and shall file with him a copy of its balance sheet and operating statement at the close of each fiscal year.

(d) *Suspension of cooperative payments.* Whenever there is reason to believe that an association is no longer meeting the qualification requirements, the market administrator shall, upon request by the Secretary, suspend cooperative payments to it, and shall give the association written notice of the suspension. Such suspended payments shall be held in reserve until the Secretary has, after notice and opportunity for a hearing, ruled upon the performance of the association.

(e) *Deductions from payments to members.* (1) Each association which is entitled to receive cooperative payments on milk which its producer members delivered to a handler other than a qualified association may file a claim with the handler for amounts to be deducted from the handler's payments to such members. The claim shall contain a list of the producers, an agreement to indemnify the handler in the making of the deductions, and a certification that the association has an unterminated membership contract with each producer, authorizing the claimed deduction.

(2) In making payments to his producers for milk received during the month, each handler shall make deductions in accordance

with the association's claim, and shall pay the amount deducted to the association within 25 days after the end of the month.

APPENDIX C

The following are relevant extracts from the Report of the House Committee on Agriculture on H. R. 8492, the bill which amended the Agricultural Adjustment Act of 1933, H. R. Rep. No. 1241, 74th Cong., 1st Sess., pp. 7-13, June 15, 1935:

> Under the amendment proposed in the bill, the orders can be made applicable only to certain commodities named in the bill, and can contain only such terms and conditions as are expressly authorized in the bill. Furthermore, the amendments contain provisions intended to safeguard the exercise of and prevent abuses in the application of the regulatory power conferred upon the Secretary. Specific exemption of producers from the power to issue orders has been provided for, and, except in the case of retailers of milk and its products, the issuance of orders applicable to retailers is restricted as set forth below. A congressional policy that orders shall be limited in their application to the smallest practicable region, and that they shall contain different terms applicable to different areas, has been carefully spelled out. These and other restrictive provisions are, in the opinion of the committee, adequately drawn to guard against any fear that the regulatory power is so broad as to subject its exercise to the risk of abuse.

Section 5 of the bill eliminates the present licensing section (sec. 8 (3).) of the Agricultural Adjustment Act, and in lieu thereof authorizes the Secretary of Agriculture to issue orders covering the marketing and distribution of specific agricultural commodities. Because the provisions of the present law for administrative revocation have been eliminated in the proposed bill, the term "license" has been discarded, and the term "order", in general usage with respect to administrative regulations, such as those of the Interstate Commerce Commission and of the Federal Trade Commission, has been substituted. To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter et al.* v. *United States,* the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing, and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities. The powers to be exercised under the proposed bill are confined within the limitations upon the Federal Authority over interstate commerce as expressed by the Supreme Court in the *Schechter case* and other cases. A comparison of the proposed provisions and the present law, and a detailed discussion of the proposed provisions with respect to orders is set forth below.

* * * * *

Third. Subsection (5) of the proposed section 8c states specifically the terms which may

be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act. Such orders may contain provisions classifying milk in accordance with its ultimate utilization, and may fix, or provide a method for fixing, minimum prices which shall be paid by handlers to producers for milk in each use classification. This provision makes it possible to take into consideration in orders dealing with milk, the difference in value between milk sold for consumption in fluid form and that used in the manufacture of such products as butter, evaporated milk, etc.

Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional

payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condition as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a "location" differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets.

* * * * *

Alternative methods of distributing the total dollar value of all milk sold in the market among the producers supplying the market are provided. Uniform prices are required to be paid to all producers and associations of producers for all milk delivered by them irrespective of the use to which such milk is put by the particular handler to whom any producer or association of producers sells its milk. An alternative provision may be included, re-

quiring instead the payment of uniform prices by each handler to all producers and associations of producers delivering milk to him, but, except in the case of orders covering manufactured milk products only, such a provision may not be included unless the Secretary finds that its inclusion is approved or favored by three-fourths of the producers by number or by volume of production.

In order to eliminate, so far as possible, violent seasonal fluctuations in the available milk supply with their attendant disturbing effect upon returns to producers, and to encourage a uniform volume of production throughout the year, an adjustment in payments to producers upon the basis of their production records during a representative period may be included in such orders, in addition to the adjustments described above. Milk orders may also provide a method for adjustments among handlers so that the payments for milk made by each handler shall equal the value of the milk to the handler in the use classification to which it is devoted by him.

To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, the price fixed for milk classified for manufacturing purposes to producers not theretofore selling milk for consumption in the area covered by the order. This time limitation is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas,

while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 90-day period. Provisions for verification of weights, for sampling and testing milk, and for insuring that producers will be paid for milk purchased from them may also be included in milk orders.

A specific provision is included in this proposed subsection safeguarding the right of cooperative marketing associations qualified under the Capper-Volstead Act to make distribution of the proceeds of milk sold by them to their members in accordance with the contracts between the cooperatives and their members.

* * * * *

Eighth. Section 14 adds a provision to section 10 (b) of the Agricultural Adjustment Act which authorizes the Secretary of Agriculture to utilize the services of State and local committees and associations of producers. The amendments permit the Secretary to utilize cooperative associations of producers in connection with the distribution of rental or benefit payments or payments for expansion of domestic or foreign markets. This section of the bill also requires the Secretary to accord such recognition and encouragement to cooperative associations owned or controlled by producers as will be in harmony with the policy toward them set forth in existing acts of Con-

gress and will tend to promote efficient methods of marketing and distribution. It is not intended by this language to discriminate against other handlers, processors, or dealers, but it has been found from experience that the participation by local committees and associations of producers has been of material value in administering the program.